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REVIEW OF THE INTERNAL SECURITY ACT (ISA)

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Abstract

This paper shows the development of the Internal Security Act 1960 (ISA), starting from Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 to Dharma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835. There are five areas of review needed, which are judicial review for specially for detention under sections 8 and 73, advisory board, review of Part XI of the Federal Constitution for Article 149 and 151, public opinion and abuse of ISA for political and other purposes. This paper also evaluates how far ISA in Malaysia, United Kingdom and India serves its purpose as the preventive detention for the national security. Whether the ISA could be administered under the normal penal system and do not thus necessarily infringe human rights principles per se. Hence, it will examine the strength and weaknesses of the ISA in each country and to suggest a better proposition of the ISA with higher standards of review to ISA.

Abstrak

Penulisan ini menunjukkan perkembangan undang-undang pencegahan ke atas tahanan yang hanya memfokus kepada Akta Keselamatan Dalam Negeri (AKDN) di Malaysia, melalui perkembangan daripada kes Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 sehinggalah Dharma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835. Terdapat lima bahagian yang memerlukan semakan, iaitu tahap semakan kehakiman ke atas seksyen 8 dan 73, penasihat, semakan ke atas Bahagian XI dalam Perlembagaan Persekutuan untuk Artikel 149 dan 151, pendapat awam dan penyalahgunaan AKDN untuk hal ehwal politik dan tujuan lain-lain. Kertas projek ini juga menilai sejauh mana AKDN di Malaysia, United Kingdom serta India mencapai tujuannya sebagai penahanan demi pencegahan ke atas keselamatan Negara. Samada AKDN boleh dikawal seperti sistem kanun yang biasa dan tidak perlu menjejaskan prinsip hak kemanusiaan. Malah, ia juga akan menguji kekuatan serta kelemahan AKDN dalam ketiga-tiga negara dan akan mencadangkan suatu posisi AKDN dengan tahap semakan yang tinggi ke atasnya.

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CHAPTER 1 : INTRODUCTION

1.0 RESEARCH OVERVIEW

ISA originated from a statute by the name of 'Internal Security Act' 1960¹. It meant to protect the public at large and their properties, and is not peculiar to Malaysia. Many of democratic countries in the world have similar statutes. Such statutes are viewed with disfavour by some persons who term it as a draconic measure that is capable of being misused by the powers that be, to settle scores with their political rivals. Such fears apart, the necessity for such legislation in the larger interests of a country and its law-abiding peace-loving people need not be over-stated.

The safety of the life, liberty and property cannot be laid bare without proper protection in the wake of insurgency, organized crime, gangsterism, violence with lethal weapons and terrorism. Equally harmful is the unbridled freedom of speech can bring about disharmony amongst different sections of the people and incite mutual hatred, threatening the very concept of unity or co-existence in a multi-racial society.

1.1 HISTORY

Originally, the Emergency Regulations 1948, along with a number of related rules and regulations, created by the British was instrumental in defeating the communist armed rebellion, and this 1948 legislation was repealed with the ending of the Emergency on 30.7.1960. The sole purpose is to combat the militant and subversive activities of the

¹ Act 82

communists in Malaysia. Although the threat of communism in Malaysia is a subject of history lessons today, the ISA continues to be used unabated.

Furthermore, it is a legislation enacted under Article 149 of the Federal Constitution, Part XI, providing for 'special powers against subversion, organized violence, and acts and crimes prejudicial to the public, and emergency powers'. Therefore, in the interests of national safety, personal inconvenience in individual cases must give way is explicitly recognized by the framers of the Federal Constitution in Part XI, Article 149 to 151.

ISA is also a preventive detention's law which has been described by **R v Halliday**² as "not a punitive but a precautionary measure and restrains a man from committing a crime he may commit but has not yet committed".

Moreover, ISA has gained notoriety since it exclude any prospects of judicial review of the executive's decision to detain someone without trial, which means that the reasons or merits of the decision by the Home Minister to detain a person without trial is unquestionable in any court. The decision to detain is done at the absolute discretion of Executive. Any challenge to a detention order can only be made on grounds of procedural impropriety.

It used to be that the initial 60 days detention by the police under the ISA could not questioned in any court. However, the court could examine whether such detentions are in fact based on national security considerations. In essence, it gives the Executive 'carte blanche' powers to detain anyone without trial. This is, to say the least, draconian as it may give rise to abuse of power.

² R v Halliday [1917] AC 260

1.2 OBJECTIVE

This paper evaluates how far ISA in Malaysia, United Kingdom and India serves its purpose as the preventive detention for the national security. Whether ISA could be administered under the normal penal system and do not thus necessarily infringe human rights principles per se. Upon reviewing the nature of the complaints on infringements of fundamental liberties that have been lodged by the people from these countries in relation to the ISA, whether there's any changes on their focus upon the alleged abuse of these two provisions by the relevant detaining authorities.

This review of the ISA is based on the legislation as it stands as of 1.11.2002 in Malaysia, therefore the research will determine the effectiveness of Malaysian's legislation in regards to the ISA if compared to the United Kingdom and India's legislation.

Specifically, this research is designed to find out the possible review to the current legislation in our country to be developed and utilized in Malaysia. Hence, it will examine the strength and weaknesses of the ISA in each country and to suggest review of a better proposition of the ISA at the end of the research.

1.3 SCOPE

The scope of research is limited to review of the ISA in Malaysia, United Kingdom and India. The work examines the foundation of each Review in these countries and by doing so explores whether the Malaysian's current position is up to the International Standards. The positions of other countries against the review of their ISA might be a good model for Malaysia to consider in reviewing its own ISA in an effective way.

In order to decide whether our ISA should be review or not, a brief study on the preventive detention of United Kingdom's and India's preventive detention statute will be done. Thereafter, a comparative study on preventive detention law regarding ISA in these 3 countries will be made at the end of the paper. The purpose is to see whether our ISA has reasonableness and fair-play, as could be found in the preventive detention laws of the other countries. The vital question here is whether the ISA in Malaysia is adequate in protecting human rights and whether the ISA has been used for the right purpose. On the other hand, the preventive detention laws in the countries examined above only apply to terrorists and persons who may be associated with terrorist activities.

The pertinent question that arises here is how one balances the need for such laws to protect society from tyranny and mayhem on the one hand and on the other hand, to ensure that such laws are not abused by the state to perpetuate its own agenda.

CHAPTER 2 : MALAYSIA'S POSITION ON PREVENTION & DETENTION

2.0 INTRODUCTION

In moving the second reading of the Bill for the ISA in Parliament on 21.6.1960, Tun Abdul Razak³, explained the rationale for the ISA thus:

'...Emergency is to be declared at an end, the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms. It is for this reason that this Bill is before the House. It has two main aims: firstly to counter

³ The then Deputy Prime Minister

subversion throughout the country and, secondly, to enable the necessary measures to be taken on the border area to counter terrorism.⁴

It is clear from the Parliamentary Debates of 21.6.1960 and 22.6.1960 that the 'evil enemy' referred to by Tun Abdul Razak was the Communist terrorist threat. However, despite the fact that in 1989 the CPM officially renounced their policy of armed struggle in Malaysia and signed a pact to that effect with the Government, the ISA remains in force today, and it is generally acknowledged that its application and proposed application have not been restricted solely to containing the Communist insurgency.

This wide-ranging application and proposed application of the ISA leave an impression that it is an ordinary piece of legislation to be used under ordinary circumstances. This impression, however, is an inaccurate one. It is in fact an extraordinary and very specific piece of legislation. If at all its provisions were to be invoked, they ought only to be invoked under extraordinary circumstances.

The preamble to the ISA contemplates the use of the provisions of the legislation only in circumstances where there is a present and imminent danger that a substantial body of persons both inside and outside of Malaysia is seeking to overthrow the lawful Government of Malaysia through unlawful means, which must include instilling fear amongst a substantial number of citizens because they resort to organized violence against persons and property. Therefore, the provisions of the ISA should not be used in cases where the commission of such offence may be dealt with under ordinary criminal law using ordinary criminal procedures.

⁴ Parliamentary Debates, Dewan Rakyat (21.6.1960), page 1185

Federal Constitution in fact highlights the exceptional nature of the ISA. Unlike any other ordinary law in Malaysia, the Constitution expressly provides for certain additional conditions that must be met before a piece of legislation which limits the rights of a person such as the ISA, may be enacted. These conditions are primarily provided for under Article 149 of the Federal Constitution.⁵

2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

UDHR was adopted and proclaimed by the General Assembly of the United Nations on 10.12.1948. In Malaysia, the provisions of the UDHR are recognized to the extent its provisions do not conflict with the provisions of the Federal Constitution. This is by virtue of Section 4(4) of the Human Rights Commission of Malaysia (Act 597) which provides that:-

“For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”⁶

Despite Federal Constitution, Human Rights are the most important law in relation to the human's life, rights and liberty. From the perspective of human rights, the ISA infringed principles of fundamental human rights when it comes to the provisions of the ISA and its arbitrary detention and degrading treatment whilst in detention as per the application of the provisions of the ISA, when most of the provisions listed in the ISA create criminal offences. Neither Malaysia nor any other countries in the world regards criminal offences to be proven beyond reasonable doubt by the prosecution. Therefore, criminal offences are regarded to be administered under a strict penal system with due care and diligent of

⁵ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page iii-iv, <http://www.suhakam.org.my>

⁶ Section 4(4) of the Human Rights Commission of Malaysia (Act 597)

all the parties, in order not to punish the wrong person for the offences charged. When most of the provisions of the ISA create criminal offences and those detainees are detained without trial from the normal penal system, it goes to show how this provision infringed the human rights basic principles of right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty.

2.2 SECTIONS 8 AND 73 OF THE ISA

There are 2 main provisions of the ISA that do infringe the human rights basic principles. As such, both of these provisions were passed by the parliament in which they confer upon the minister and the police, respectively, they have the power to detain a person and any person at all, without trial for a period of 2 years with the power to renew the detention period. These provisions are Sections 8 and 73.

Section 8 (1) of the ISA reads:-

*'(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.'*⁷

⁷ Section 8(1) of the Internal Security Act 1960

As at Februari 2010, without prejudice to the recent cases such as **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835**⁸, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁹, and **Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113**¹⁰, decision for **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹¹ which has been overruled by the abovementioned ought to be addressed for the purpose of this paper and the development of the preventive detention, thus will be treated as 'History' in the law of the ISA.

2.2.1 THE LAW ON PREVENTIVE DETENTION BEFORE 2009

In **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹², the applicant was detained pursuant to an order made under Section 8(1)(a) of the ISA, No.18 of 1960 and as required by Section 11(1), a copy of the order was served on the applicant on 18.5.1967. It seems that the satisfaction of the authority that it is necessary to make an order under the said Section 8(1)(a) with a view to or with the object of preventing a person from doing a particular prejudicial act must necessarily be based on grounds essentially connected with that prejudicial act. Thus if the object of the detention is to prevent a person from acting in a manner prejudicial to the maintenance of essential services the order must be based on the grounds that he had acted in a manner prejudicial to the maintenance of certain essential services as specified in the Third Schedule to the said Act and not on the grounds that he had acted in a manner prejudicial to the security of Malaysia or to the maintenance of public order.

⁸ Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835

⁹ Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301

¹⁰ Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113

¹¹ Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

¹² Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

In **State of Bombay v Atma Ram**¹³, it was held that:-

'The satisfaction of the Government must be based on some grounds.

There can be no satisfaction if there are no grounds for the same...'

In the affidavit of Tun Abdul Razak, the order of detention was signed by him on 17.5.1967 'as a result of the decision of the Cabinet to prevent the applicant from **acting in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein** under section 8(1)'. All the four possible objects of detention are thus recited in the affidavit. The order, however, recites only three of the leaving out the security of any part of Malaysia. Although it is headed '**Grounds on which the Order is made**' the 1st paragraph of A1 clearly shows that there was only one ground i.e. that applicant had '**since 1957 consistently acted in a manner prejudicial to the security of Malaysia**' on which the Cabinet had made the order under the said Section 8(1)(a), the rest of the paragraph being merely particulars in support of that ground and it is contended by the applicant that as both Tun Abdul Razak's affidavit and the order had cited not only the security of Malaysia but also the other objects the Cabinet had not properly applied its mind when making the order and that applicant is entitled to be released.

Ibrahim J (as he then was) states:-

'...it is clear that all that Tun Abdul Razak's affidavit could mean is that the Cabinet on the only ground and allegations of fact before it was satisfied that it was necessary to detain the applicant under the said Section 8(1)(a) with a view to preventing him from acting in a manner

¹³ State of Bombay v Atma Ram AIR 1951 SC 157

prejudicial to the security of Malaysia only. The body of the order was in printed form with strokes used to separate the three objects of detention and it is obvious that the two other objects had inadvertently not been struck out. Had the Cabinet decided to detain the applicant with a view to or with the object of preventing him from doing all the four prejudicial acts it would be reasonable to expect that the order would have not been made on the printed form which contains only three of the four possible objects of detention...'

Cabinet can order any person's detention under Section 8(1)(a) with a view to preventing him from acting in a manner prejudicial to the security of Malaysia only for he has throughout his affidavit contended that even if the allegations against him were true they would not constitute a danger to the present or future security of Malaysia. The words 'with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein in Section 8(1)(a) do not indicate the grounds for a person's detention; they indicate its purpose. It is true that the grounds for a person's detention must be given, but grounds are quite distinct from purposes.

In **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹⁴, the Minister has given the grounds for the detainee in his Affidavit. Those grounds are quite distinct from the purposes stated in the order of detention, and when the two are read together there is no conflict or discrepancy between them, as such:-

'...because (grounds) you the appellant have since 1957 consistently acted in a manner prejudicial to the security of Malaysia, the Yang di-

¹⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

Pertuan Agong is satisfied that it is necessary to direct that you be detained with a view to (purposes) preventing you from acting in any manner prejudicial to the security of Malaysia or to the maintenance of public order or to the maintenance of essential services in Malaysia'.

In light of the above, Ibrahim Judge held the grounds supplied could be in words totally different from the statement of the purposes of detention.

Hence, as long as the Minister is satisfied to detain a person, it is not open for any review by the court. However, the detainee may allege and prove mala fide. The power of detention is given to the highest authority in the land, the Yang Di-Pertuan Agong acting on Cabinet advice, and there has been no delegation to civil servants.

The Singapore High Court in **Lee Mau Seng [1971] 2 MLJ 137¹⁵**, used a harder approach.

Wee Chong Jin CJ held:-

'... "Mala fides" or bad faith in the sense used by Mr. Marshall is not in my view a justiciable issue in the context of the Act and the power conferred by the Act on a body such as the President who has to act in accordance with the advice of the Cabinet to direct the issue of an order of detention if the President is satisfied with a view to preventing a person from acting in any manner prejudicial to the security of Singapore...'

¹⁵ Lee Mau Seng [1971] 2 MLJ 137

In light of the above, we are made to understand that the principle adopted in Singapore is striking if compared to Malaysia, where judicial review is not available even if alleged mala fide.

Furthermore, in **Re Application of Tan Boon Liat [1976] 2 MLJ 83**¹⁶ in the Federal Court, the applicant challenged the validity of the order of detention solely on the contention, that the grounds on which the order was made are dehors the purview and ambit of the Ordinance. The applications were dismissed and subsequent appeals to the Federal Court were also dismissed. Abdoocader J held:-

‘...emergency legislation enacted by the Yang Dipertuan Agung by virtue of the powers vested in him under Article 150(2) of the Federal Constitution as a result of a Proclamation of Emergency issued by His Majesty under clause (1) of that Article. The principle that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the executive has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved...’

It was further held:-

‘...Applying the norms and principles enunciated in the selection of cases I have adumbrated and which I wholly agree and would respectfully adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was

¹⁶ Re Application of Tan Boon Liat [1976] 2 MLJ 83

made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally...'

Here there was a clear breach of procedural rule which is the Advisory Board had not made its recommendation within three months of the detentions of the applicants. However, at the time the applications were made, the Advisory Board had made their recommendations though after three months. It was argued that their continued detentions after a lapse of three months were illegal and unlawful as within the three months the Advisory Board had not met to consider the representations made by the applicants and, following that, made representations to the Yang di Pertuan Agong. Yet, Arulanandom J held that while the procedural requirements had not been complied with, valid orders of detention were in force against the applicants and their detention was therefore legal.

Whereas, in **Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLJ 82**¹⁷, the facts are similar to **Re Application of Tan Boon Liat [1976] 2 MLJ 83**¹⁸. Hamid J dismissed the application. The learned judge, held:-

'...In this case there has been a failure to comply with the statutory direction but mere non-compliance with directory provision, so long as the Advisory Board considers the representations and makes its

¹⁷ Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLJ 82

¹⁸ Re Application of Tan Boon Liat [1976] 2 MLJ 83

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¹⁷ Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLJ 82

¹⁸ Re Application of Tan Boon Liat [1976] 2 MLJ 83

recommendations, should not render unlawful a detention lawfully made.'

Furthermore, it limits judicial review to only procedural breach, as per Section 8B of the ISA, reads:-

*"There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision."*¹⁹

As far as **Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman** [1989] 1 MLJ 418²⁰ is concerned, the Supreme Court held that there is no basis for detention under Section 8(1), yet may this case be of any relevance after Section 8B(1) of the ISA came into force?

In this case the respondent had been detained pursuant to an order made under Section 8(1). According to the affidavit of the Minister for Home Affairs, he was satisfied that the detention of the respondent was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. The grounds for detention stated that the respondent was involved in a plan or programme to propagate Christianity among the Malays and it was also alleged that the activities of the respondent could give rise to tension and enmity between the Muslim community and the Christian community in

¹⁹ Section 8B of the Internal Security Act 1960

²⁰ Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman [1989] 1 MLJ 418

Malaysia and could affect national security. The allegation of fact stated that the respondent participated in a group for the purpose of spreading Christianity among the Malays, that he participated in a work camp and seminar for such purpose and that he converted six Malays to Christianity. On an application by the respondent for habeas corpus, the learned trial judge took the view that the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under Article 11 of the Federal Constitution and therefore if the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Article 11 and therefore any order of detention would not be valid. He therefore ordered the release of the respondent from detention. The Minister for Home Affairs appealed.

The Supreme Court dismissed the appeal and held as follows:-

‘(1) The sum total of the grounds for detention in this case was the supposed involvement of the respondent in a programme or plan for the dissemination of Christianity among Malays. The grounds do not, however, state that any actions have been done by the respondent except participation in meetings and seminars, and the fourth allegation alleged that the respondent converted six Malays to Christianity.

(2) The mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it is true, it could not by itself be regarded as a threat to the security of the country.

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(2) The mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it is true, it could not by itself be regarded as a threat to the security of the country.

(3) The grounds for the detention in the present case read in the proper context are insufficient to fall within the scope of the Internal Security Act 1960, which is a piece of legislation essentially to prevent and combat subversion and actions prejudicial to public order and national security.

(4) The guarantee provided by art 11 of the Federal Constitution, that is, the freedom to profess and practise one's religion, must be given effect to unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.'

From the decision of this case, we can see that the supremacy of the Federal Constitution is taken into account. As far as the minister so satisfied with the detention, the said satisfaction ended up in the hands of the judges to decide whether or not they are sufficient and when it is obvious that it would not fall under the ISA, the judge has the power to say so.

The said case refers to **Re Tan Sri Raja Khalid [1988] 1 MLJ 182²¹**, in which the authority had stated that they had reason to believe that the substantial losses suffered by a bank caused by the manner in which loans were approved through the acts of the detainee/applicant could evoke feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces which in turn could lead them to resorting to violent actions and thereby affecting the security of the country. The trial judge there thought it to be incredible that losses sustained by a public bank where the depositors also included members of the public at large could result in any organized violence by the soldiers. The

²¹ Re Tan Sri Raja Khalid [1988] 1 MLJ 182

said Honourable Court was of the view that it would be naive to preclude the judge from making his own evaluation and assessment from an obvious statement of fact.

In **Jamaluddin's** case²² the judges were of the view that the grounds for the detention in that case read in the proper context are insufficient to fall within the scope of the ISA. The guarantee provided by Art 11 of the Constitution, for instance, the freedom to profess and practise one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion. Therefore, the appeal by the Home Minister was dismissed by the Honourable Court.

As far as the law is concerned, S. 8B (1) of the ISA 1960 has postulated an ouster clause. [Act A739/1989]. In which our ISA followed Singapore's legislation. Singapore legislated the ouster clause first in response to **Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132**²³ when the Court of Appeal in Singapore refused to follow **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**²⁴.

In this case, Teo Soh Lung, Kevin de Souza and Wong Souk Yee were arrested with others on 21.5.1987 on the ground that they were involved in a Marxist conspiracy to subvert and destabilize the country to establish a Marxist state. On 19.6.1987, the Minister of Home Affairs made detention orders pursuant to Section 8(1)(a) directing that Teo, de Souza and Wong be detained for one year with effect from 20.6.1987. The appellant applied for habeas corpus, but was dismissed by the learned High Court judge. Nevertheless, the Court of Appeal allowed their appeals and held as follows:-

²² Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman [1989] 1 MLJ 418

²³ Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132

²⁴ *Darna Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

'(1) Where detention under s 8 of the Act was challenged, the initial burden was on the executive to justify the legality of the detention; this burden was discharged by the production of the detention order and evidence that the President, acting in accordance with advice of Cabinet or the authorized Minister, was satisfied as required by s 8(1) of the Act.

(2) It was for the executive to prove that the President was satisfied as under s 8(1) of the Act, the President's satisfaction preceded the minister's powers to make the detention order...

(5) In the present appeals, the respondents had not discharged their burden of proving that the President was satisfied as required by s 8(1) of the Act before the minister made the detention orders. These appeals must therefore be allowed on this ground.

(6) The President's satisfaction under s 8 of the Act and the minister's satisfaction under s 10 were both reviewable by a court of law as:(a) the subjective test adopted in Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 and its progeny could no longer be supported and the objective test was applicable upon a judicial review of the exercise of these discretions; and (b) although a court would not question the executive's decision as to what national security required, the court could examine whether the executive's decision was in fact based on national security considerations; similarly, although the court would not question whether detention was necessary for the purpose specified in s 8(1), the court could

examine whether the matters relied on by the executive fell within the scope of those specified purposes;

(7) The scope of review of the discretions under ss 8(1) and 10 of the Act, however, depended on whether these discretions fell within the 'precedent fact category' so that the 'precedent fact principle of review' was applicable.

(8) Where the 'precedent fact principle of review' applied, the court's function was, first, to determine whether the precedent fact had been established by the decision-maker to exist on a balance of probabilities and, secondly, where such fact was established, to review the decision that was challenged on GCHQ grounds.

(9) Whether the discretions fell within the 'precedent fact category' depended on a construction of the relevant provisions, the question being whether Parliament had made clear its intention to take the discretions out of the precedent fact category.

(10) It was clear that the discretions under ss 8(1) and 10 of the Act had been entrusted to the executive, thereby taking these discretions out of the precedent fact category; there were no jurisdictional or precedent facts which precede these discretions.

(11) In the circumstances, the scope of review of these discretions was limited to the grounds of illegality, irrationality or procedural impropriety...'

The learned judge came to say that the time has come for Singapore to recognize that the subjective test in respect of Section 8 and Section 10 of the ISA can no longer be supported. The Honourable Court accept the contention that **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129**²⁵ and its progeny can no longer be said to be good law in so far as the decision in **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129**²⁶ had applied the case of **Liversidge v Anderson [1942] AC 206**²⁷ and its companion case **Greene v Secretary of State for Home Affairs [1942] AC 284**²⁸. The House of Lords has, in recent years, recognized that the majority judgments in both the latter cases were wrong, preferring instead the strong dissenting judgment of Lord Atkin.

In adding the ouster clause to the ISA, it means that there will be no substantive review in each and every preventive detention's cases but only procedural review is allowed by the Court. Therefore, Section 8B(1) of the ISA was inserted as the aftermath of **Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132**²⁹.

Whereas failure to give a detainee the correct number of prescribed forms for making representations in the case of **Aw Ngoh Leang v Inspector General Of Police & Ors [1993] 1 MLJ 65**³⁰, the said failure resulted in prejudice and injustice pursuant to Public Order and Prevention of Crime (Procedure) Rules 1972 r 3(2). In this case, the appellant was detained under the Emergency (Public Order and prevention of Crime) Ordinance 1969. When he was detained, only one copy of the prescribed form for making representations against the detention was given to him, contrary to r 3 of the Public Order

²⁵ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

²⁶ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

²⁷ *Liversidge v Anderson [1942] AC 206*

²⁸ *Greene v Secretary of State for Home Affairs [1942] AC 284*

²⁹ *Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132*

³⁰ *Aw Ngoh Leang v Inspector General Of Police & Ors [1993] 1 MLJ 65*

and Prevention of Crime (Procedure) Rules 1972 ('the Rules'). An application for habeas corpus was dismissed in the High Court and the appellant appealed.

The Supreme Court held:-

'(1) The provisions of r 3(2) of the Rules are mandatory as they concern the right of a person detained without trial to seek his own release by a procedure for the making of representations requiring the filling-up of a minimum of two forms and of one more if the detainee intends to be represented by an advocate before the Advisory Board. Any disobedience of the mandatory requirements for the protection of this right would vitiate an order of detention made even if no real prejudice has ensued to the detainee.

(2) The maxim de minimis non curat lex relied on by the learned trial judge can have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual.'

Whereas, Section 73 of the ISA gave power to the police to detain suspected persons, and reads:-

"(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe –
(a) that there are grounds which would justify his detention under section 8; and

*(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.”*³¹

Here comes the landmark judgment of the Supreme Court in **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470**³². In that case, the detainee was detained under s. 73(1) and subsequently under s. 73(3)(a) & (b) of ISA 1960. He applied for habeas corpus. As we understand it, the judgment of the Supreme Court brought out a few important points but we need only state one which we consider being more relevant to the present discussion and that is that s. 73(1) and s. 8 are so inextricably connected that the subjective test should be applied to both. The court held that it cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s. 73(1). But if facts are furnished voluntarily and in great detail as in this case for consideration of the court, it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion. In that case, the Supreme Court found it difficult to disagree with the learned judge on his conclusion based on the facts furnished in court that the losses sustained by Perwira Affin Bank would lead to any organized violence by soldiers. The Supreme Court therefore affirmed the learned judge's decision to issue the writ of habeas corpus.

Less than two months after the Supreme Court delivered its judgment in **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja**

³¹ Section 73 of the Internal Security Act 1960

³² **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470**

Harun [1987] 2 CLJ 470³³, the Supreme Court delivered its judgment in **Theresa Lim Chin Chin & Ors v. Inspector General of Police** [1988] 1 MLJ 293³⁴. In this case the detainee challenged her arrest under s. 73 of the ISA 1960. The issue is regarding the subjective or objective test that should be applied by the court regarding the satisfaction of the police officer making the arrest (or the Minister making the detention order). The court noted that the submission that it was the objective test that should be applied was earlier made in Tan Sri Raja Khalid's case³⁵ and was rejected by the court although the court upheld the release of the detainee in that case because the arresting officer had sworn an affidavit to the effect that the arrest and detention related to allegations of bank fraud which was a criminal offence. The Honourable Court, then held:-

'...In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and by the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as the subjective test...'

On 9 March 1988 Peh Swee Chin J (as he then was) delivered his judgment in **Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor** [1988] 1 CLJ 197³⁶. In this case, the detainee challenged the detention order issued under Section 8 of the ISA 1960. In that case six allegations were made against the applicant which formed the basis of the detention order. The Minister subsequently admitted that there was

³³ Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470

³⁴ Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293

³⁵ Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun

[1987] 2 CLJ 470

³⁶ Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 CLJ 197

an error in the sixth allegation as the detainee did not on that date, time and place spoke of the issue alleged. Peh Swee Chin J (as he then was), in allowing the application held:-

'(1) there are three exceptions to the non-justiciability of the Minister's mental satisfaction in cases of this kind. They are (a) mala fide, (b) the stated grounds of detention not being within the scope of the enabling legislation, i.e. the Act, and (c) the failure to comply with a condition precedent;

(2) mala fides does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised;

(3) although the error relating to the sixth allegation was probably made in the course of enquiries by the police, the Minister cannot rid himself of the error of the police because the process starting with the initial arrest of the applicant under section 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one. Such being the case, any period or any part of such one continuous process can be looked into to see if the care and caution have been exercised with a proper sense of responsibility for the purpose of ascertaining if the detention order was properly made;

(4) viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being

made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form;

(5) the sixth allegation, though an irrelevant allegation which the court can enquire into, was also an inaccurate allegation that can be treated as being outside the scope of the Act;

(6) with regard to the contention that the detention order was necessary having regard to the first to fifth allegations, this court should not accede to the contentions.'

Pursuant to **Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309**³⁷, the challenge in the Federal Court was against the detention by the police under Section 73 of the ISA 1960. So, the provisions of Section 8B and Section 8C of the ISA were not applicable because Section 8B(1) only talks about "any act done or decision made by the Yang di Pertuan Agong or the Minister." So, that case is not relevant to the present discussion.'

It was held that there is no such ouster in relation to Section 73(1) of the ISA as an ouster is provided only in Section 8b of the ISA, which by its express wording only applies to acts done or decisions made by the Yang di Pertuan Agong or the minister. Section 8b of the ISA reads:-

(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the

³⁷ Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309

exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8a...'

In this case, it was held that both Sections 8 and 73 are clear and unambiguous; that there is only one 'preventive detention' ultimately is irrelevant. The ISA expressly provides for that ultimate decision to be arrived at in two stages: the first under Section 73 and the second under Section 8. While Sections 73 and 8 are connected, they are not 'inextricably linked'. Both sections can operate independently of each other in that under Section 73, no ministerial order is needed and under Section 8, no police investigation is necessary. Nothing turns on the reference by Section 73 to grounds under Section 8. If it did, then no detention could take place under Section 73 unless the minister himself was satisfied, and the fact of this satisfaction was made known to the police. If this were the case, then there would be no need for Section 73. Vitiating of Section 73 would lead to vitiating of Section 8. Whereas, **Re Tan Sri Raja Khalid [1988] 1 MLJ 182³⁸** and **Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293³⁹** were wrongly decided on this point.

In addition to the foregoing, the decisions were inherently contradictory in that if a subjective approach was required under Section 73, it must be irrelevant whether or not evidence is disclosed to the courts. Furthermore, such privilege as the detaining authority

³⁸ Re Tan Sri Raja Khalid [1988] 1 MLJ 182
³⁹ Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293

may have as regards disclosure of evidence must not be confused with the issue of whether the court can or cannot inquire into grounds of detention. The fact that evidence is not disclosed does not mean that the court cannot inquire. Allegations of fact are as much evidence of matters taken into consideration as the grounds of detention.

There is a clear difference, he maintained, in the wording of Sections 8(1) and 73(1) of the ISA. For the former, the phrase used is 'if the Minister is satisfied' which makes it subjective. In the latter 'has reason to believe' is objective.

The court is therefore entitled to enquire whether there are grounds, or facts which give rise to, or form the basis of, the belief of the detaining officer, the reasonableness of the grounds, and whether the procedural elements of Section 73(1) of the ISA have been fulfilled.

According to Steve Shim CJ, 'Inextricably connected' would mean that Sections 73(1) and 8 are wholly dependant on each other. In the court's view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under Section 73. What matters of national interest are infinitely varied? So are matters of national security of the State. These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. Furthermore, police investigation under Section 73 may stop short of submission or reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. Clearly, if it was the intention of Parliament to impose a mandatory obligation on the part of the minister to consider the police investigation under

Section 73 before he could issue a detention order under Section 8, Parliament would have expressly provided for it, but such express provisions are absent in Section 8 or Section 73 of the ISA, thus although Sections 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. In the circumstances, it cannot therefore be said that they are 'inextricably connected'.

2.2.1.1 HUMAN RIGHTS PRINCIPLES

In allowing detention of a person without trial by the ISA as per Sections 8 and 73 clearly goes against the human rights principles in that the person detained is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty, which is drastically contradict with Articles 3, 10 and 11(1) of the Universal Declaration of Human Rights (UDHR).

Article 3 of the UDHR reads:-

'Everyone has the right to life, liberty and security of person.'⁴⁰

Article 10 of the UDHR reads:-

'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'⁴¹

Article 11(1) of the UDHR reads:-

⁴⁰ Article 3 of the UDHR

⁴¹ Article 10 of the UDHR

***'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'*⁴²**

The application of Sections 8 and 73 of the ISA to date has led to infringements of the human rights basic principles as per Articles 3, 10 and 11(1) of the UDHR, which are fundamental principle of human rights.

Thus, arbitrary detention include the arrest and detention of individuals for the collateral or ulterior purpose of gathering of intelligence that were wholly unconnected with national security issues and the arrest and detention of a director of a bank who was believed to have caused the bank to suffer substantial losses. The right of a person not to be subjected to arbitrary arrest or detention is enshrined in Article 9 of the UDHR, which reads as follows:-

***'No one shall be subjected to arbitrary arrest, detention or exile.'*⁴³**

In an interview with Mr Karpal Singh (previous detainee), he expressed that such punishment does not appear to be part of an endemic routine, there have been individuals who have been subjected to some form of inhuman or degrading treatment or punishment whilst in detention. However, he was being punished for allegedly committing a criminal offence under the relevant rules governing the place of detention in which the detention was in an orientation cell without proper toilet facilities. He was detained without trial for 15 months by the ISA, being treated like a prisoner and being detained in the prison.

⁴² Article 11(1) of the UDHR

⁴³ Article 9 of the UDHR

HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

2.2.1.2

Further, the Inquiry Panel established by the SUHAKAM to conduct a public inquiry into the conditions of detention under the ISA made the following finding in relation to detainees detained under Section 73 of the ISA:-

*'... there appears to be sufficient evidence to justify a finding of cruel, inhuman or degrading treatment of some of the detainees who testified before the Inquiry Panel. Slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment, by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention'*⁴⁴

The right of a person not to be subjected to inhuman or degrading treatment or punishment is enshrined in article 5 of the UDHR, it reads:-

*'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'*⁴⁵

⁴⁴ SUHAKAM (2003), p. 16 (paragraph 6.2.11)

⁴⁵ Article 5 of the UDHR

- (i) Where the power to detain an individual is not accompanied by the right of the detainee to a fair and public trial, there is no accountability for the exercise of the power by the relevant detaining authority to an independent and impartial body. This absence of accountability gives rise to the possibility of abuse in the form of arbitrary arrest or detention and imposition of inhuman or degrading treatment or punishment;
- (ii) There are inadequate safeguards in the law (either the ISA or the rules and regulations governing the places of detention in which detainees detained under the ISA are held) to check possible abuse of the power to detain without trial. For example:-
 - (a) Although the preamble to the ISA is very clear as to the precise circumstance in which the provisions of the ISA ought to be invoked (if at all), the precise grounds on which persons may be detained under sections 8 and 73 are, at best, very vague. Questions abound as to the exact meaning of the phrases "prejudicial to the security of Malaysia", "prejudicial to the maintenance of essential services of Malaysia" or "prejudicial to the economic life of Malaysia". This lack of clear criteria on the grounds on which an individual may be detained without trial gives rise to the possibility of persons being detained way beyond the framework of the ISA;
 - (b) There are inadequate safeguards in the law to guard against incommunicado detention (where detainees are denied total access to the outside world). For example, whilst detainees under the custody of the

Police are held in undisclosed places of detention, there is a lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention. Further, although the Lockup Rules 1953 and the Internal Security (Detained Persons) Rules 1960 do in fact allow detainees some access to the outside world which include access to family members, legal counsel or to a medical officer, it is not entirely clear as to the exact time in which detainees may be allowed such access. Therefore, there have been detainees who have been denied access to counsel for up to 60 days and detainees who have been denied access to family members for up to 40 days whilst in police custody. The lack of access to the outside world for a prolonged period of time coupled with the detention of persons in undisclosed places of detention without independent supervision pose an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses;

- (c) The ISA does not contain a provision limiting the life of the legislation; and
- (d) The ISA does not contain an express provision which specifically requires the relevant detaining authority to be accountable to Parliament for its actions under the Act.

Police are held in undisclosed places of detention, there is a lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention. Further, although the Lockup Rules 1953 and the Internal Security (Detained Persons) Rules 1960 do in fact allow detainees some access to the outside world which include access to family members, legal counsel or to a medical officer, it is not entirely clear as to the exact time in which detainees may be allowed such access. Therefore, there have been detainees who have been denied access to counsel for up to 60 days and detainees who have been denied access to family members for up to 40 days whilst in police custody. The lack of access to the outside world for a prolonged period of time coupled with the detention of persons in undisclosed places of detention without independent supervision pose an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses;

- (c) The ISA does not contain a provision limiting the life of the legislation; and
- (d) The ISA does not contain an express provision which specifically requires the relevant detaining authority to be accountable to Parliament for its actions under the Act.

- (iii) there have been occasions where detainees have not been conferred the basic fundamental rights that are contained within the framework of the Constitution which include the fundamental right to be informed of grounds of arrest and the right to be produced promptly before a Magistrate. This appears to be because of a legal provision which specifically oust such right or the different interpretations of the law or as a result of the occasional imperfect implementation of the law by the detaining authorities. The proper conferment of these basic fundamental rights may guard against abuse of the power to detain without trial.⁴⁶

The original provisions of the ISA did in fact contain some very important safeguards against abuse of the power to detain without trial. However, over the years they have been gradually eroded. For example, in 1971, the grounds on which a person may be detained under Sections 8 and 73 of the ISA were extended to include actions which are alleged to be prejudicial to the maintenance of essential services of Malaysia and prejudicial to the economic life of Malaysia. This extension added to the ambiguity of the exact grounds on which a person may be detained without trial under the ISA. This extension also appears to have been done without first meeting the requirements of Article 149 of the Constitution.⁴⁷

In 1971, the maximum number of days in which the Police could detain a person under Section 73 was increased from 30 days to the present 60 days. Deprivation of a person's liberty for such an extended period appears to have been made based on the apparent insufficiency of 30 days for the files of a person detained under Section 73 to be brought from the Police at contingent level to the headquarters of the Police and subsequently to the Ministry of Home Affairs. This amendment bears the inherent danger of detainees

⁴⁶ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page vi-ix, <http://www.suhakam.org.my>

⁴⁷ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii, <http://www.suhakam.org.my>

being detained under Section 73 for a period of time that is beyond what is “strictly necessary”.⁴⁸

In 1988, the ISA was amended in order to validate detentions made under Section 8(1) although the relevant detainees are detained in a place of detention that is different from the one as directed by the Minister. This amendment increases the possibility of incommunicado detention and consequently, the inherent danger of inhuman or degrading treatment.⁴⁹

In 1989, the ISA was amended to exclude any judicial review of the grounds of detention made under Section 8 of the ISA. Thus detainees held under this section are not only denied a fair and public trial, they are also denied their minimum right to an effective opportunity to be heard promptly by an independent Judiciary which may decide on the lawfulness of their detention and may order their release if their detention were to be found unlawful. This increases the risk of individuals being detained beyond the framework of the ISA, thereby resulting in the increased danger of individuals being subjected to arbitrary detention.⁵⁰

2.2.1.4 JUDICIAL REVIEW BEFORE 2009

The ghost of **Liversidge v Sir John Anderson**⁵¹ and **R v Halliday**⁵² still haunt our system of justice, in which Judicial Review for preventive detention is a subject test as governed

⁴⁸ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii, <http://www.suhakam.org.my>

⁴⁹ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii, <http://www.suhakam.org.my>

⁵⁰ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page ix <http://www.suhakam.org.my>

⁵¹ Liversidge v Sir John Anderson [1942] AC 206

⁵² R v Halliday [1917] AC 260

by **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁵³. It went all back to the 16th Century when the administrative law yet to develop.

2.2.2 THE LAW ON PREVENTIVE DETENTION AFTER 2009

Discussion above has been noted as 'History' when **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others** 2009 MLJU 0835⁵⁴, **Lee Kwan Woh v Public Prosecutor** [2009] 5 MLJ 301⁵⁵, and **Sivarasa Rasiah v Badan Peguam Negara and Anor** [2009] MLJU 01113⁵⁶ came into picture.

Although Darma Suria was not detained under the ISA, but we have no doubt appreciate that Darma Suria is the recent case which change the standing of all preventive detention's statutes, including our beloved ISA. In this case, the appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 on 4.4.2008. An order was made by the Minister under Section 4(1) of the Ordinance detaining the appellant for a period of two years. The appellant then moved to the High Court for an order of habeas corpus. The High Court declined to grant the order, hence this appeal. The issue that arose was whether the Minister had acted lawfully in classifying the activity the appellant was alleged to be involved in, which was the smuggling of stolen cars out of Malaysia, as constituting an act prejudicial to public order.

It is to be noted that the section says "if the Minister is satisfied". The first question that has to be determined is whether that phrase imports a subjective or an objective element. By referring to **Merdeka University Bhd v Government of Malaysia** [1982] 2 MLJ 243⁵⁷, the

⁵³ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

⁵⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

⁵⁵ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301

⁵⁶ *Sivarasa Rasiah v Badan Peguam Negara and Anor* [2009] MLJU 01113

⁵⁷ *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243

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Discussion above has been noted as 'History' when **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835**⁵⁴, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁵⁵, and **Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113**⁵⁶ came into picture.

Although Darma Suria was not detained under the ISA, but we have no doubt appreciate that Darma Suria is the recent case which change the standing of all preventive detention's statutes, including our beloved ISA. In this case, the appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 on 4.4.2008. An order was made by the Minister under Section 4(1) of the Ordinance detaining the appellant for a period of two years. The appellant then moved to the High Court for an order of habeas corpus. The High Court declined to grant the order, hence this appeal. The issue that arose was whether the Minister had acted lawfully in classifying the activity the appellant was alleged to be involved in, which was the smuggling of stolen cars out of Malaysia, as constituting an act prejudicial to public order.

It is to be noted that the section says "if the Minister is satisfied". The first question that has to be determined is whether that phrase imports a subjective or an objective element. By referring to **Merdeka University Bhd v Government of Malaysia [1982] 2 MLJ 243**⁵⁷, the

⁵³ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

⁵⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835*

⁵⁵ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301

⁵⁶ *Sivarasa Rasiah v Badan Peguam Negara and Anor* [2009] MLJU 01113

⁵⁷ *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243

words used by the statute were "If, the Yang di-Pertuan Agong is satisfied". In interpreting that statutory formula, Suffian LP said that in the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable. Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance⁵⁸ it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

There is a principle of ancient repute that—

"...where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied." Reg. v Home Secretary ex p. Khawaja [1984] 1 AC 74 , per Lord Scarman.

And as Lord Kingarth observed in **Cameron v Gibson [2005] CSIH 83⁵⁹**:

⁵⁸ *Darna Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

⁵⁹ *Cameron v Gibson* [2005] CSIH 83

“Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made ultra vires ... when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have ...”

That then brings us to the central question whether the activity in which the appellant was involved in was prejudicial to public order. If it is not, then habeas corpus must issue. This is because whether particular activity comes within the scope of being prejudicial to public order is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter upon that question. This much is made clear by the several authorities on the subject and is implicit from the leading case of *Re Application of Tan Boon Liat* [1976] 2 MLJ 83⁶⁰ where Abdoolcader J said:

*“The expression ‘public order’ is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term ‘public order’ in *Romesh Thappar v State of Madras* AIR 1950 SC 124, 127 (in particular at page 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquillity, that ‘public safety’ is a part of the*

⁶⁰ *Re Application of Tan Boon Liat* [1976] 2 MLJ 83

wider concept of 'public order', that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety."

In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquillity.

Does the activity engaged in by the appellant come within the foregoing test? It does. What the appellant was engaged in was the illegal export of stolen cars. An act of smuggling stolen cars may per se not be prejudicial to public order but this is a case in which a syndicate was involved, as the grounds of detention clearly state. This activity had the effect of providing for thieves and would be thieves a ready market for the disposal of stolen cars. This has the obvious potential to disrupt public tranquillity. Because no car may be safe from being either robbed or stolen and its recovery made impossible by reason of the appellant's assistance in their disposal. There is no doubt also that the activity engaged in by the appellant had the potential to disrupt the even tempo of the life of the community. The even tempo of life of the community is disrupted when there is serious risk of loss of property through theft. It follows that a reasonable decision-maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instance did not therefore commit any error of law in making the order he did. Therefore, the judges of the Federal Court dismissed the appeal.

It is pertinent to note that the phrase 'if the Minister is satisfied' has imports an objective element as discussed above. When there is a question of law, Gopal Sri Ram FCJ held that the court is the final arbitrator upon the question. By looking at the judgment made by the Federal Court in this regard, it is utmost important to realize that **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁶¹ has been overruled by this case. At the same time, this case had neutralized the ouster clause of the preventive detention. The court hereby becomes the primary reviewer and justice is no longer in the hand of the Minister and the best example would be the case of Darma Suria which gave fresh air to the people and a new believe that the judiciary is not bound by the executive's decision.

In a prominent case, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁶², although it is not a preventive detention case, nevertheless, its new principle given by Gopal Sri Ram FCJ binds every other cases thereof. The Honourable FCJ stated that the constitution is a document sui generis governed by interpretive principles of its own which imposes a duty on the court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. Further in interpreting provisions appearing in Part II of the Constitution the court must bear in mind Article 8 that guarantees fairness in all legislative, administrative and judicial action. All legislative, in my view, includes the ISA. Therefore, this case also overruled **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁶³, as the Federal Court held as follows:-

'It is equally our misfortune that we find ourselves in disagreement with the contrary view expressed by Suffian LP in the same case and in Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2

⁶¹ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

⁶² *Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301*

⁶³ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

MLJ 129. In our judgment what art 5(1) strikes down is all forms of state action that deprive either life or personal liberty bearing a meaning of the widest amplitude in contravention of substantive or procedural law.'

Decision in **Lee Kwan Woh v Public Prosecutor** [2009] 5 MLJ 301⁶⁴ has been reaffirmed by Gopal Sri Ram FCJ in **Sivarasa Rasiah v Badan Peguam Negara and Anor**, Rayuan Sivill No. 01-8-2006 (W), unreported⁶⁵. Reads:-

'In three recent decisions this Court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are Badan Peguam Malaysia v Kerajaan Malaysia [2008] 1 CLJ 521 , Lee Kwan Woh v Public Prosecutor [2009] 1 LNS 778 and Shamim Reza v Public Prosecutor [2009] 6 CLJ 93 . The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept.'

⁶⁴ Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301
⁶⁵ Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113

REVIEW OF THE INTERNAL SECURITY ACT (ISA)

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Abstract

This paper shows the development of the Internal Security Act 1960 (ISA), starting from Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 to Darna Suria bin Risma Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835. There are five areas of review needed, which are judicial review for specially for detention under sections 8 and 73, advisory board, review of Part XI of the Federal Constitution for Article 149 and 151, public opinion and abuse of ISA for political and other purposes. This paper also evaluates how far ISA in Malaysia, United Kingdom and India serves its purpose as the preventive detention for the national security. Whether the ISA could be administered under the normal penal system and do not thus necessarily infringe human rights principles per se. Hence, it will examine the strength and weaknesses of the ISA in each country and to suggest a better proposition of the ISA with higher standards of review to ISA.

Abstrak

Penulisan ini menunjukkan perkembangan undang-undang pencegahan ke atas tahanan yang hanya memfokus kepada Akta Keselamatan Dalam Negeri (AKDN) di Malaysia, melalui perkembangan daripada kes Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 sehinggalah Darna Suria bin Risma Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835. Terdapat lima bahagian yang memerlukan semakan, iaitu tahap semakan kehakiman ke atas seksyen 8 dan 73, penasihat, semakan ke atas Bahagian XI dalam Perlembagaan Persekutuan untuk Artikel 149 dan 151, pendapat awam dan penyalahgunaan AKDN untuk hal ehwal politik dan tujuan lain-lain. Kertas projek ini juga menilai sejauh mana AKDN di Malaysia, United Kingdom serta India mencapai tujuannya sebagai penahanan demi pencegahan ke atas keselamatan Negara. Samada AKDN boleh dikawal seperti sistem kanun yang biasa dan tidak perlu menjejaskan prinsip hak kemanusiaan. Malah, ia juga akan menguji kekuatan serta kelemahan AKDN dalam ketiga-tiga negara dan akan mencadangkan suatu posisi AKDN dengan tahap semakan yang tinggi ke atasnya.

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CHAPTER 1 : INTRODUCTION

1.0 RESEARCH OVERVIEW

ISA originated from a statute by the name of 'Internal Security Act' 1960¹. It meant to protect the public at large and their properties, and is not peculiar to Malaysia. Many of democratic countries in the world have similar statutes. Such statutes are viewed with disfavour by some persons who term it as a draconic measure that is capable of being misused by the powers that be, to settle scores with their political rivals. Such fears apart, the necessity for such legislation in the larger interests of a country and its law-abiding peace-loving people need not be over-stated.

The safety of the life, liberty and property cannot be laid bare without proper protection in the wake of insurgency, organized crime, gangsterism, violence with lethal weapons and terrorism. Equally harmful is the unbridled freedom of speech can bring about disharmony amongst different sections of the people and incite mutual hatred, threatening the very concept of unity or co-existence in a multi-racial society.

1.1 HISTORY

Originally, the Emergency Regulations 1948, along with a number of related rules and regulations, created by the British was instrumental in defeating the communist armed rebellion, and this 1948 legislation was repealed with the ending of the Emergency on 30.7.1960. The sole purpose is to combat the militant and subversive activities of the

¹ Act 82

communists in Malaysia. Although the threat of communism in Malaysia is a subject of history lessons today, the ISA continues to be used unabated.

Furthermore, it is a legislation enacted under Article 149 of the Federal Constitution, Part XI, providing for 'special powers against subversion, organized violence, and acts and crimes prejudicial to the public, and emergency powers'. Therefore, in the interests of national safety, personal inconvenience in individual cases must give way is explicitly recognized by the framers of the Federal Constitution in Part XI, Article 149 to 151.

ISA is also a preventive detention's law which has been described by **R v Halliday**² as "not a punitive but a precautionary measure and restrains a man from committing a crime he may commit but has not yet committed".

Moreover, ISA has gained notoriety since it exclude any prospects of judicial review of the executive's decision to detain someone without trial, which means that the reasons or merits of the decision by the Home Minister to detain a person without trial is unquestionable in any court. The decision to detain is done at the absolute discretion of Executive. Any challenge to a detention order can only be made on grounds of procedural impropriety.

It used to be that the initial 60 days detention by the police under the ISA could not be questioned in any court. However, the court could examine whether such detentions are in fact based on national security considerations. In essence, it gives the Executive 'carte blanche' powers to detain anyone without trial. This is, to say the least, draconian as it may give rise to abuse of power.

² R v Halliday [1917] AC 260

1.2 OBJECTIVE

This paper evaluates how far ISA in Malaysia, United Kingdom and India serves its purpose as the preventive detention for the national security. Whether ISA could be administered under the normal penal system and do not thus necessarily infringe human rights principles per se. Upon reviewing the nature of the complaints on infringements of fundamental liberties that have been lodged by the people from these countries in relation to the ISA, whether there's any changes on their focus upon the alleged abuse of these two provisions by the relevant detaining authorities.

This review of the ISA is based on the legislation as it stands as of 1.11.2002 in Malaysia, therefore the research will determine the effectiveness of Malaysian's legislation in regards to the ISA if compared to the United Kingdom and India's legislation.

Specifically, this research is designed to find out the possible review to the current legislation in our country to be developed and utilized in Malaysia. Hence, it will examine the strength and weaknesses of the ISA in each country and to suggest review of a better proposition of the ISA at the end of the research.

1.3 SCOPE

The scope of research is limited to review of the ISA in Malaysia, United Kingdom and India. The work examines the foundation of each Review in these countries and by doing so explores whether the Malaysian's current position is up to the International Standards. The positions of other countries against the review of their ISA might be a good model for Malaysia to consider in reviewing its own ISA in an effective way.

In order to decide whether our ISA should be review or not, a brief study on the preventive detention of United Kingdom's and India's preventive detention statute will be done. Thereafter, a comparative study on preventive detention law regarding ISA in these 3 countries will be made at the end of the paper. The purpose is to see whether our ISA has reasonableness and fair-play, as could be found in the preventive detention laws of the other countries. The vital question here is whether the ISA in Malaysia is adequate in protecting human rights and whether the ISA has been used for the right purpose. On the other hand, the preventive detention laws in the countries examined above only apply to terrorists and persons who may be associated with terrorist activities.

The pertinent question that arises here is how one balances the need for such laws to protect society from tyranny and mayhem on the one hand and on the other hand, to ensure that such laws are not abused by the state to perpetuate its own agenda.

CHAPTER 2 : MALAYSIA'S POSITION ON PREVENTION & DETENTION

2.0 INTRODUCTION

In moving the second reading of the Bill for the ISA in Parliament on 21.6.1960, Tun Abdul Razak³, explained the rationale for the ISA thus:

'...Emergency is to be declared at an end, the Government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he has failed by force of arms. It is for this reason that this Bill is before the House. It has two main aims: firstly to counter

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³ The then Deputy Prime Minister

subversion throughout the country and, secondly, to enable the necessary measures to be taken on the border area to counter terrorism.⁴

It is clear from the Parliamentary Debates of 21.6.1960 and 22.6.1960 that the 'evil enemy' referred to by Tun Abdul Razak was the Communist terrorist threat. However, despite the fact that in 1989 the CPM officially renounced their policy of armed struggle in Malaysia and signed a pact to that effect with the Government, the ISA remains in force today, and it is generally acknowledged that its application and proposed application have not been restricted solely to containing the Communist insurgency.

This wide-ranging application and proposed application of the ISA leave an impression that it is an ordinary piece of legislation to be used under ordinary circumstances. This impression, however, is an inaccurate one. It is in fact an extraordinary and very specific piece of legislation. If at all its provisions were to be invoked, they ought only to be invoked under extraordinary circumstances.

The preamble to the ISA contemplates the use of the provisions of the legislation only in circumstances where there is a present and imminent danger that a substantial body of persons both inside and outside of Malaysia is seeking to overthrow the lawful Government of Malaysia through unlawful means, which must include instilling fear amongst a substantial number of citizens because they resort to organized violence against persons and property. Therefore, the provisions of the ISA should not be used in cases where the commission of such offence may be dealt with under ordinary criminal law using ordinary criminal procedures.

⁴ Parliamentary Debates, Dewan Rakyat (21.6.1960), page 1185

Federal Constitution in fact highlights the exceptional nature of the ISA. Unlike any other ordinary law in Malaysia, the Constitution expressly provides for certain additional conditions that must be met before a piece of legislation which limits the rights of a person such as the ISA, may be enacted. These conditions are primarily provided for under Article 149 of the Federal Constitution.⁵

2.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

UDHR was adopted and proclaimed by the General Assembly of the United Nations on 10.12.1948. In Malaysia, the provisions of the UDHR are recognized to the extent its provisions do not conflict with the provisions of the Federal Constitution. This is by virtue of Section 4(4) of the Human Rights Commission of Malaysia (Act 597) which provides that:-

“For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”⁶

Despite Federal Constitution, Human Rights are the most important law in relation to the human's life, rights and liberty. From the perspective of human rights, the ISA infringed principles of fundamental human rights when it comes to the provisions of the ISA and its arbitrary detention and degrading treatment whilst in detention as per the application of the provisions of the ISA, when most of the provisions listed in the ISA create criminal offences. Neither Malaysia nor any other countries in the world regards criminal offences to be proven beyond reasonable doubt by the prosecution. Therefore, criminal offences are regarded to be administered under a strict penal system with due care and diligent of

⁵ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page iii-iv., <http://www.suhakam.org.my>

⁶ Section 4(4) of the Human Rights Commission of Malaysia (Act 597)

all the parties, in order not to punish the wrong person for the offences charged. When most of the provisions of the ISA create criminal offences and those detainees are detained without trial from the normal penal system, it goes to show how this provision infringed the human rights basic principles of right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty.

2.2 SECTIONS 8 AND 73 OF THE ISA

There are 2 main provisions of the ISA that do infringe the human rights basic principles. As such, both of these provisions were passed by the parliament in which they confer upon the minister and the police, respectively, they have the power to detain a person and any person at all, without trial for a period of 2 years with the power to renew the detention period. These provisions are Sections 8 and 73.

Section 8 (1) of the ISA reads:-

*'(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.'*⁷

⁷ Section 8(1) of the Internal Security Act 1960

As at Februari 2010, without prejudice to the recent cases such as **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835**⁸, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁹, and **Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113**¹⁰, decision for **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹¹ which has been overruled by the abovementioned ought to be addressed for the purpose of this paper and the development of the preventive detention, thus will be treated as 'History' in the law of the ISA.

2.2.1 THE LAW ON PREVENTIVE DETENTION BEFORE 2009

In **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹², the applicant was detained pursuant to an order made under Section 8(1)(a) of the ISA, No.18 of 1960 and as required by Section 11(1), a copy of the order was served on the applicant on 18.5.1967. It seems that the satisfaction of the authority that it is necessary to make an order under the said Section 8(1)(a) with a view to or with the object of preventing a person from doing a particular prejudicial act must necessarily be based on grounds essentially connected with that prejudicial act. Thus if the object of the detention is to prevent a person from acting in a manner prejudicial to the maintenance of essential services the order must be based on the grounds that he had acted in a manner prejudicial to the maintenance of certain essential services as specified in the Third Schedule to the said Act and not on the grounds that he had acted in a manner prejudicial to the security of Malaysia or to the maintenance of public order.

⁸ Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835

⁹ Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301

¹⁰ Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113

¹¹ Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

¹² Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

In **State of Bombay v Atma Ram**¹³, it was held that:-

'The satisfaction of the Government must be based on some grounds.

There can be no satisfaction if there are no grounds for the same...'

In the affidavit of Tun Abdul Razak, the order of detention was signed by him on 17.5.1967 'as a result of the decision of the Cabinet to prevent the applicant from **acting in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein** under section 8(1)'. All the four possible objects of detention are thus recited in the affidavit. The order, however, recites only three of the leaving out the security of any part of Malaysia. Although it is headed '**Grounds on which the Order is made**' the 1st paragraph of A1 clearly shows that there was only one ground i.e. that applicant had '**since 1957 consistently acted in a manner prejudicial to the security of Malaysia**' on which the Cabinet had made the order under the said Section 8(1)(a), the rest of the paragraph being merely particulars in support of that ground and it is contended by the applicant that as both Tun Abdul Razak's affidavit and the order had cited not only the security of Malaysia but also the other objects the Cabinet had not properly applied its mind when making the order and that applicant is entitled to be released.

Ibrahim J (as he then was) states:-

'...it is clear that all that Tun Abdul Razak's affidavit could mean is that the Cabinet on the only ground and allegations of fact before it was satisfied that it was necessary to detain the applicant under the said Section 8(1)(a) with a view to preventing him from acting in a manner

¹³ State of Bombay v Atma Ram AIR 1951 SC 157

prejudicial to the security of Malaysia only. The body of the order was in printed form with strokes used to separate the three objects of detention and it is obvious that the two other objects had inadvertently not been struck out. Had the Cabinet decided to detain the applicant with a view to or with the object of preventing him from doing all the four prejudicial acts it would be reasonable to expect that the order would have not been made on the printed form which contains only three of the four possible objects of detention...'

Cabinet can order any person's detention under Section 8(1)(a) with a view to preventing him from acting in a manner prejudicial to the security of Malaysia only for he has throughout his affidavit contended that even if the allegations against him were true they would not constitute a danger to the present or future security of Malaysia. The words 'with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein in Section 8(1)(a) do not indicate the grounds for a person's detention; they indicate its purpose. It is true that the grounds for a person's detention must be given, but grounds are quite distinct from purposes.

In **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**¹⁴, the Minister has given the grounds for the detainee in his Affidavit. Those grounds are quite distinct from the purposes stated in the order of detention, and when the two are read together there is no conflict or discrepancy between them, as such:-

'...because (grounds) you the appellant have since 1957 consistently acted in a manner prejudicial to the security of Malaysia, the Yang di-

¹⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

Pertuan Agong is satisfied that it is necessary to direct that you be detained with a view to (purposes) preventing you from acting in any manner prejudicial to the security of Malaysia or to the maintenance of public order or to the maintenance of essential services in Malaysia’.

In light of the above, Ibrahim Judge held the grounds supplied could be in words totally different from the statement of the purposes of detention.

Hence, as long as the Minister is satisfied to detain a person, it is not open for any review by the court. However, the detainee may allege and prove mala fide. The power of detention is given to the highest authority in the land, the Yang Di-Pertuan Agong acting on Cabinet advice, and there has been no delegation to civil servants.

The Singapore High Court in **Lee Mau Seng [1971] 2 MLJ 137¹⁵**, used a harder approach.

Wee Chong Jin CJ held:-

‘...“Mala fides” or bad faith in the sense used by Mr. Marshall is not in my view a justiciable issue in the context of the Act and the power conferred by the Act on a body such as the President who has to act in accordance with the advice of the Cabinet to direct the issue of an order of detention if the President is satisfied with a view to preventing a person from acting in any manner prejudicial to the security of Singapore...’

¹⁵ Lee Mau Seng [1971] 2 MLJ 137

In light of the above, we are made to understand that the principle adopted in Singapore is striking if compared to Malaysia, where judicial review is not available even if alleged mala fide.

Furthermore, in **Re Application of Tan Boon Liat [1976] 2 MLJ 83**¹⁶ in the Federal Court, the applicant challenged the validity of the order of detention solely on the contention, that the grounds on which the order was made are dehors the purview and ambit of the Ordinance. The applications were dismissed and subsequent appeals to the Federal Court were also dismissed. Abdoocader J held:-

‘...emergency legislation enacted by the Yang Dipertuan Agung by virtue of the powers vested in him under Article 150(2) of the Federal Constitution as a result of a Proclamation of Emergency issued by His Majesty under clause (1) of that Article. The principle that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the executive has no relevance in dealing with an executive measure by way of preventing a public danger when the safety of the State is involved...’

It was further held:-

‘...Applying the norms and principles enunciated in the selection of cases I have adumbrated and which I wholly agree and would respectfully adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was

¹⁶ Re Application of Tan Boon Liat [1976] 2 MLJ 83

made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally...'

Here there was a clear breach of procedural rule which is the Advisory Board had not made its recommendation within **three months** of the detentions of the applicants. However, at the time the applications were made, the Advisory Board had made their recommendations though after three months. It was argued that their continued detentions after a lapse of three months were illegal and unlawful as within the three months the Advisory Board had not met to consider the representations made by the applicants and, following that, made representations to the Yang di Pertuan Agong. Yet, Arulanandom J held that while the procedural requirements had not been complied with, valid orders of detention were in force against the applicants and their detention was therefore legal.

Whereas, in **Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors** [1977] 1 MLJ 82¹⁷, the facts are similar to **Re Application of Tan Boon Liat** [1976] 2 MLJ 83¹⁸. Hamid J dismissed the application. The learned judge, held:-

'...In this case there has been a failure to comply with the statutory direction but mere non-compliance with directory provision, so long as the Advisory Board considers the representations and makes its

¹⁷ Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 MLJ 82

¹⁸ Re Application of Tan Boon Liat [1976] 2 MLJ 83

recommendations, should not render unlawful a detention lawfully made.'

Furthermore, it limits judicial review to only procedural breach, as per Section 8B of the ISA, reads:-

*"There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision."*¹⁹

As far as **Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman** [1989] 1 MLJ 418²⁰ is concerned, the Supreme Court held that there is no basis for detention under Section 8(1), yet may this case be of any relevance after Section 8B(1) of the ISA came into force?

In this case the respondent had been detained pursuant to an order made under Section 8(1). According to the affidavit of the Minister for Home Affairs, he was satisfied that the detention of the respondent was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia. The grounds for detention stated that the respondent was involved in a plan or programme to propagate Christianity among the Malays and it was also alleged that the activities of the respondent could give rise to tension and enmity between the Muslim community and the Christian community in

¹⁹ Section 8B of the Internal Security Act 1960

²⁰ Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman [1989] 1 MLJ 418

Malaysia and could affect national security. The allegation of fact stated that the respondent participated in a group for the purpose of spreading Christianity among the Malays, that he participated in a work camp and seminar for such purpose and that he converted six Malays to Christianity. On an application by the respondent for habeas corpus, the learned trial judge took the view that the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under Article 11 of the Federal Constitution and therefore if the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Article 11 and therefore any order of detention would not be valid. He therefore ordered the release of the respondent from detention. The Minister for Home Affairs appealed.

The Supreme Court dismissed the appeal and held as follows:-

'(1) The sum total of the grounds for detention in this case was the supposed involvement of the respondent in a programme or plan for the dissemination of Christianity among Malays. The grounds do not, however, state that any actions have been done by the respondent except participation in meetings and seminars, and the fourth allegation alleged that the respondent converted six Malays to Christianity.'

(2) The mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it is true, it could not by itself be regarded as a threat to the security of the country.'

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(2) The mere participation in meetings and seminars could not make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it is true, it could not by itself be regarded as a threat to the security of the country.'

(3) The grounds for the detention in the present case read in the proper context are insufficient to fall within the scope of the Internal Security Act 1960, which is a piece of legislation essentially to prevent and combat subversion and actions prejudicial to public order and national security.

(4) The guarantee provided by art 11 of the Federal Constitution, that is, the freedom to profess and practise one's religion, must be given effect to unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.'

From the decision of this case, we can see that the supremacy of the Federal Constitution is taken into account. As far as the minister so satisfied with the detention, the said satisfaction ended up in the hands of the judges to decide whether or not they are sufficient and when it is obvious that it would not fall under the ISA, the judge has the power to say so.

The said case refers to **Re Tan Sri Raja Khalid [1988] 1 MLJ 182²¹**, in which the authority had stated that they had reason to believe that the substantial losses suffered by a bank caused by the manner in which loans were approved through the acts of the detainee/applicant could evoke feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces which in turn could lead them to resorting to violent actions and thereby affecting the security of the country. The trial judge there thought it to be incredible that losses sustained by a public bank where the depositors also included members of the public at large could result in any organized violence by the soldiers. The

²¹ Re Tan Sri Raja Khalid [1988] 1 MLJ 182

said Honourable Court was of the view that it would be naive to preclude the judge from making his own evaluation and assessment from an obvious statement of fact.

In **Jamaluddin's** case²² the judges were of the view that the grounds for the detention in that case read in the proper context are insufficient to fall within the scope of the ISA. The guarantee provided by Art 11 of the Constitution, for instance, the freedom to profess and practise one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion. Therefore, the appeal by the Home Minister was dismissed by the Honourable Court.

As far as the law is concern, S. 8B (1) of the ISA 1960 has postulated an ouster clause. [Act A739/1989]. In which our ISA followed Singapore's legislation. Singapore legislated the ouster clause first in response to **Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132**²³ when the Court of Appeal in Singapore refused to follow **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**²⁴.

In this case, Teo Soh Lung, Kevin de Souza and Wong Souk Yee were arrested with others on 21.5.1987 on the ground that they were involved in a Marxist conspiracy to subvert and destabilize the country to establish a Marxist state. On 19.6.1987, the Minister of Home Affairs made detention orders pursuant to Section 8(1)(a) directing that Teo, de Souza and Wong be detained for one year with effect from 20.6.1987. The appellant applied for habeas corpus, but was dismissed by the learned High Court judge. Nevertheless, the Court of Appeal allowed their appeals and held as follows:-

²² Minister For Home Affairs, Malaysia & Anor v Jamaluddin Bin Othman [1989] 1 MLJ 418

²³ Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132

²⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

'(1) Where detention under s 8 of the Act was challenged, the initial burden was on the executive to justify the legality of the detention; this burden was discharged by the production of the detention order and evidence that the President, acting in accordance with advice of Cabinet or the authorized Minister, was satisfied as required by s 8(1) of the Act.

(2) It was for the executive to prove that the President was satisfied as under s 8(1) of the Act, the President's satisfaction preceded the minister's powers to make the detention order...

(5) In the present appeals, the respondents had not discharged their burden of proving that the President was satisfied as required by s 8(1) of the Act before the minister made the detention orders. These appeals must therefore be allowed on this ground.

*(6) The President's satisfaction under s 8 of the Act and the minister's satisfaction under s 10 were both reviewable by a court of law as: (a) the subjective test adopted in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 and its progeny could no longer be supported and the objective test was applicable upon a judicial review of the exercise of these discretions; and (b) although a court would not question the executive's decision as to what national security required, the court could examine whether the executive's decision was in fact based on national security considerations; similarly, although the court would not question whether detention was necessary for the purpose specified in s 8(1), the court could*

examine whether the matters relied on by the executive fell within the scope of those specified purposes;

(7) The scope of review of the discretions under ss 8(1) and 10 of the Act, however, depended on whether these discretions fell within the 'precedent fact category' so that the 'precedent fact principle of review' was applicable.

(8) Where the 'precedent fact principle of review' applied, the court's function was, first, to determine whether the precedent fact had been established by the decision-maker to exist on a balance of probabilities and, secondly, where such fact was established, to review the decision that was challenged on GCHQ grounds.

(9) Whether the discretions fell within the 'precedent fact category' depended on a construction of the relevant provisions, the question being whether Parliament had made clear its intention to take the discretions out of the precedent fact category.

(10) It was clear that the discretions under ss 8(1) and 10 of the Act had been entrusted to the executive, thereby taking these discretions out of the precedent fact category; there were no jurisdictional or precedent facts which precede these discretions.

(11) In the circumstances, the scope of review of these discretions was limited to the grounds of illegality, irrationality or procedural impropriety...'

The learned judge came to say that the time has come for Singapore to recognize that the subjective test in respect of Section 8 and Section 10 of the ISA can no longer be supported. The Honourable Court accept the contention that **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129**²⁵ and its progeny can no longer be said to be good law in so far as the decision in **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129**²⁶ had applied the case of **Liversidge v Anderson [1942] AC 206**²⁷ and its companion case **Greene v Secretary of State for Home Affairs [1942] AC 284**²⁸. The House of Lords has, in recent years, recognized that the majority judgments in both the latter cases were wrong, preferring instead the strong dissenting judgment of Lord Atkin.

In adding the ouster clause to the ISA, it means that there will be no substantive review in each and every preventive detention's cases but only procedural review is allowed by the Court. Therefore, Section 8B(1) of the ISA was inserted as the aftermath of **Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132**²⁹.

Whereas failure to give a detainee the correct number of prescribed forms for making representations in the case of **Aw Ngoh Leang v Inspector General Of Police & Ors [1993] 1 MLJ 65**³⁰, the said failure resulted in prejudice and injustice pursuant to Public Order and Prevention of Crime (Procedure) Rules 1972 r 3(2). In this case, the appellant was detained under the Emergency (Public Order and prevention of Crime) Ordinance 1969. When he was detained, only one copy of the prescribed form for making representations against the detention was given to him, contrary to r 3 of the Public Order

²⁵ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

²⁶ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

²⁷ *Liversidge v Anderson [1942] AC 206*

²⁸ *Greene v Secretary of State for Home Affairs [1942] AC 284*

²⁹ *Chng Suan Tze V Minister Of Home Affairs & Ors And Other Appeals [1988] 1 SLR 132*

³⁰ *Aw Ngoh Leang v Inspector General Of Police & Ors [1993] 1 MLJ 65*

and Prevention of Crime (Procedure) Rules 1972 ('the Rules'). An application for habeas corpus was dismissed in the High Court and the appellant appealed.

The Supreme Court held:-

'(1) The provisions of r 3(2) of the Rules are mandatory as they concern the right of a person detained without trial to seek his own release by a procedure for the making of representations requiring the filling-up of a minimum of two forms and of one more if the detainee intends to be represented by an advocate before the Advisory Board. Any disobedience of the mandatory requirements for the protection of this right would vitiate an order of detention made even if no real prejudice has ensued to the detainee.'

(2) The maxim de minimis non curat lex relied on by the learned trial judge can have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual.'

Whereas, Section 73 of the ISA gave power to the police to detain suspected persons, and reads:-

"(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe –
(a) that there are grounds which would justify his detention under section 8; and

*(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.”*³¹

Here comes the landmark judgment of the Supreme Court in **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470**³². In that case, the detainee was detained under s. 73(1) and subsequently under s. 73(3)(a) & (b) of ISA 1960. He applied for habeas corpus. As we understand it, the judgment of the Supreme Court brought out a few important points but we need only state one which we consider being more relevant to the present discussion and that is that s. 73(1) and s. 8 are so inextricably connected that the subjective test should be applied to both. The court held that it cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s. 73(1). But if facts are furnished voluntarily and in great detail as in this case for consideration of the court, it would be naive to preclude the judge from making his own evaluation and assessment to come to a reasonable conclusion. In that case, the Supreme Court found it difficult to disagree with the learned judge on his conclusion based on the facts furnished in court that the losses sustained by Perwira Affin Bank would lead to any organized violence by soldiers. The Supreme Court therefore affirmed the learned judge's decision to issue the writ of habeas corpus.

Less than two months after the Supreme Court delivered its judgment in **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja**

³¹ Section 73 of the Internal Security Act 1960

³² **Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470**

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Harun [1987] 2 CLJ 470³³, the Supreme Court delivered its judgment in **Theresa Lim Chin Chin & Ors v. Inspector General of Police** [1988] 1 MLJ 293³⁴. In this case the detainee challenged her arrest under s. 73 of the ISA 1960. The issue is regarding the subjective or objective test that should be applied by the court regarding the satisfaction of the police officer making the arrest (or the Minister making the detention order). The court noted that the submission that it was the objective test that should be applied was earlier made in Tan Sri Raja Khalid's case³⁵ and was rejected by the court although the court upheld the release of the detainee in that case because the arresting officer had sworn an affidavit to the effect that the arrest and detention related to allegations of bank fraud which was a criminal offence. The Honourable Court, then held:-

'...In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and by the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as the subjective test...'

On 9 March 1988 Peh Swee Chin J (as he then was) delivered his judgment in **Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor** [1988] 1 CLJ 197³⁶. In this case, the detainee challenged the detention order issued under Section 8 of the ISA 1960. In that case six allegations were made against the applicant which formed the basis of the detention order. The Minister subsequently admitted that there was

³³ *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1987] 2 CLJ 470

³⁴ *Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293

³⁵ *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun* [1987] 2 CLJ 470

³⁶ *Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 CLJ 197

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³⁵ Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v. Tan Sri Raja Khalid bin Raja Harun [1987] 2 CLJ 470

³⁶ Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 CLJ 197

an error in the sixth allegation as the detainee did not on that date, time and place spoke of the issue alleged. Peh Swee Chin J (as he then was), in allowing the application held:-

'(1) there are three exceptions to the non-justiciability of the Minister's mental satisfaction in cases of this kind. They are (a) mala fide, (b) the stated grounds of detention not being within the scope of the enabling legislation, i.e. the Act, and (c) the failure to comply with a condition precedent;

(2) mala fides does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, i.e. for a purpose other than the purpose for which it is professed to have been exercised;

(3) although the error relating to the sixth allegation was probably made in the course of enquiries by the police, the Minister cannot rid himself of the error of the police because the process starting with the initial arrest of the applicant under section 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one. Such being the case, any period or any part of such one continuous process can be looked into to see if the care and caution have been exercised with a proper sense of responsibility for the purpose of ascertaining if the detention order was properly made;

(4) viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being

made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form;

(5) the sixth allegation, though an irrelevant allegation which the court can enquire into, was also an inaccurate allegation that can be treated as being outside the scope of the Act;

(6) with regard to the contention that the detention order was necessary having regard to the first to fifth allegations, this court should not accede to the contentions.'

Pursuant to **Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals** [2002] 4 CLJ 309³⁷, the challenge in the Federal Court was against the detention by the police under Section 73 of the ISA 1960. So, the provisions of Section 8B and Section 8C of the ISA were not applicable because Section 8B(1) only talks about "any act done or decision made by the Yang di Pertuan Agong or the Minister." So, that case is not relevant to the present discussion.'

It was held that there is no such ouster in relation to Section 73(1) of the ISA as an ouster is provided only in Section 8b of the ISA, which by its express wording only applies to acts done or decisions made by the Yang di Pertuan Agong or the minister. Section 8b of the ISA reads:-

(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the

³⁷ Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309

exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8a...'

In this case, it was held that both Sections 8 and 73 are clear and unambiguous; that there is only one 'preventive detention' ultimately is irrelevant. The ISA expressly provides for that ultimate decision to be arrived at in two stages: the first under Section 73 and the second under Section 8. While Sections 73 and 8 are connected, they are not 'inextricably linked'. Both sections can operate independently of each other in that under Section 73, no ministerial order is needed and under Section 8, no police investigation is necessary. Nothing turns on the reference by Section 73 to grounds under Section 8. If it did, then no detention could take place under Section 73 unless the minister himself was satisfied, and the fact of this satisfaction was made known to the police. If this were the case, then there would be no need for Section 73. Vitiating of Section 73 would lead to vitiating of Section 8. Whereas, **Re Tan Sri Raja Khalid [1988] 1 MLJ 182³⁸** and **Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293³⁹** were wrongly decided on this point.

In addition to the foregoing, the decisions were inherently contradictory in that if a subjective approach was required under Section 73, it must be irrelevant whether or not evidence is disclosed to the courts. Furthermore, such privilege as the detaining authority

³⁸ Re Tan Sri Raja Khalid [1988] 1 MLJ 182

³⁹ Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293

may have as regards disclosure of evidence must not be confused with the issue of whether the court can or cannot inquire into grounds of detention. The fact that evidence is not disclosed does not mean that the court cannot inquire. Allegations of fact are as much evidence of matters taken into consideration as the grounds of detention.

There is a clear difference, he maintained, in the wording of Sections 8(1) and 73(1) of the ISA. For the former, the phrase used is 'if the Minister is satisfied' which makes it subjective. In the latter 'has reason to believe' is objective.

The court is therefore entitled to enquire whether there are grounds, or facts which give rise to, or form the basis of, the belief of the detaining officer, the reasonableness of the grounds, and whether the procedural elements of Section 73(1) of the ISA have been fulfilled.

According to Steve Shim CJ, 'Inextricably connected' would mean that Sections 73(1) and 8 are wholly dependant on each other. In the court's view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the minister. It would mean that the minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under Section 73. What matters of national interest are infinitely varied? So are matters of national security of the State. These are the concerns of the minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. Furthermore, police investigation under Section 73 may stop short of submission or reference to the minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. Clearly, if it was the intention of Parliament to impose a mandatory obligation on the part of the minister to consider the police investigation under

Section 73 before he could issue a detention order under Section 8, Parliament would have expressly provided for it, but such express provisions are absent in Section 8 or Section 73 of the ISA, thus although Sections 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. In the circumstances, it cannot therefore be said that they are 'inextricably connected'.

2.2.1.1 HUMAN RIGHTS PRINCIPLES

In allowing detention of a person without trial by the ISA as per Sections 8 and 73 clearly goes against the human rights principles in that the person detained is denied the right to personal liberty, the right to a fair trial and the right to be presumed innocent until proved guilty, which is drastically contradict with Articles 3, 10 and 11(1) of the Universal Declaration of Human Rights (UDHR).

Article 3 of the UDHR reads:-

'Everyone has the right to life, liberty and security of person.'⁴⁰

Article 10 of the UDHR reads:-

'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'⁴¹

Article 11(1) of the UDHR reads:-

⁴⁰ Article 3 of the UDHR

⁴¹ Article 10 of the UDHR

***'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.'*⁴²**

The application of Sections 8 and 73 of the ISA to date has led to infringements of the human rights basic principles as per Articles 3, 10 and 11(1) of the UDHR, which are fundamental principle of human rights.

Thus, arbitrary detention include the arrest and detention of individuals for the collateral or ulterior purpose of gathering of intelligence that were wholly unconnected with national security issues and the arrest and detention of a director of a bank who was believed to have caused the bank to suffer substantial losses. The right of a person not to be subjected to arbitrary arrest or detention is enshrined in Article 9 of the UDHR, which reads as follows:-

***'No one shall be subjected to arbitrary arrest, detention or exile.'*⁴³**

In an interview with Mr Karpal Singh (previous detainee), he expressed that such punishment does not appear to be part of an endemic routine, there have been individuals who have been subjected to some form of inhuman or degrading treatment or punishment whilst in detention. However, he was being punished for allegedly committing a criminal offence under the relevant rules governing the place of detention in which the detention was in an orientation cell without proper toilet facilities. He was detained without trial for 15 months by the ISA, being treated like a prisoner and being detained in the prison.

⁴² Article 11(1) of the UDHR

⁴³ Article 9 of the UDHR

2.2.1.2 HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

Further, the Inquiry Panel established by the SUHAKAM to conduct a public inquiry into the conditions of detention under the ISA made the following finding in relation to detainees detained under Section 73 of the ISA:-

*'... there appears to be sufficient evidence to justify a finding of cruel, inhuman or degrading treatment of some of the detainees who testified before the Inquiry Panel. Slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprivation of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment, by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention'*⁴⁴

The right of a person not to be subjected to inhuman or degrading treatment or punishment is enshrined in article 5 of the UDHR, it reads:-

*'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'*⁴⁵

⁴⁴ SUHAKAM (2003), p. 16 (paragraph 6.2.11)

⁴⁵ Article 5 of the UDHR

- (i) Where the power to detain an individual is not accompanied by the right of the detainee to a fair and public trial, there is no accountability for the exercise of the power by the relevant detaining authority to an independent and impartial body. This absence of accountability gives rise to the possibility of abuse in the form of arbitrary arrest or detention and imposition of inhuman or degrading treatment or punishment;
- (ii) There are inadequate safeguards in the law (either the ISA or the rules and regulations governing the places of detention in which detainees detained under the ISA are held) to check possible abuse of the power to detain without trial. For example:-
 - (a) Although the preamble to the ISA is very clear as to the precise circumstance in which the provisions of the ISA ought to be invoked (if at all), the precise grounds on which persons may be detained under sections 8 and 73 are, at best, very vague. Questions abound as to the exact meaning of the phrases "prejudicial to the security of Malaysia", "prejudicial to the maintenance of essential services of Malaysia" or "prejudicial to the economic life of Malaysia". This lack of clear criteria on the grounds on which an individual may be detained without trial gives rise to the possibility of persons being detained way beyond the framework of the ISA;
 - (b) There are inadequate safeguards in the law to guard against incommunicado detention (where detainees are denied total access to the outside world). For example, whilst detainees under the custody of the

Police are held in undisclosed places of detention, there is a lack of provision in the Lockup Rules 1953 specifically providing for unhampered regular visits by independent, qualified and responsible persons to supervise the strict observance of the relevant laws and regulations by the relevant authorities in charge of the administration of such undisclosed places of detention. Further, although the Lockup Rules 1953 and the Internal Security (Detained Persons) Rules 1960 do in fact allow detainees some access to the outside world which include access to family members, legal counsel or to a medical officer, it is not entirely clear as to the exact time in which detainees may be allowed such access. Therefore, there have been detainees who have been denied access to counsel for up to 60 days and detainees who have been denied access to family members for up to 40 days whilst in police custody. The lack of access to the outside world for a prolonged period of time coupled with the detention of persons in undisclosed places of detention without independent supervision pose an inherent danger of abuse of power, particularly in terms of torture or other cruel, inhuman or degrading treatment during interrogations. The relevant detaining authorities, being beyond outside scrutiny for their actions, may believe that they can act with impunity and without restraint as it is often difficult to mount an effective prosecution without independent witnesses;

- (c) The ISA does not contain a provision limiting the life of the legislation; and
- (d) The ISA does not contain an express provision which specifically requires the relevant detaining authority to be accountable to Parliament for its actions under the Act.

- (iii) there have been occasions where detainees have not been conferred the basic fundamental rights that are contained within the framework of the Constitution which include the fundamental right to be informed of grounds of arrest and the right to be produced promptly before a Magistrate. This appears to be because of a legal provision which specifically oust such right or the different interpretations of the law or as a result of the occasional imperfect implementation of the law by the detaining authorities. The proper conferment of these basic fundamental rights may guard against abuse of the power to detain without trial.⁴⁶

The original provisions of the ISA did in fact contain some very important safeguards against abuse of the power to detain without trial. However, over the years they have been gradually eroded. For example, in 1971, the grounds on which a person may be detained under Sections 8 and 73 of the ISA were extended to include actions which are alleged to be prejudicial to the maintenance of essential services of Malaysia and prejudicial to the economic life of Malaysia. This extension added to the ambiguity of the exact grounds on which a person may be detained without trial under the ISA. This extension also appears to have been done without first meeting the requirements of Article 149 of the Constitution.⁴⁷

In 1971, the maximum number of days in which the Police could detain a person under Section 73 was increased from 30 days to the present 60 days. Deprivation of a person's liberty for such an extended period appears to have been made based on the apparent insufficiency of 30 days for the files of a person detained under Section 73 to be brought from the Police at contingent level to the headquarters of the Police and subsequently to the Ministry of Home Affairs. This amendment bears the inherent danger of detainees

⁴⁶ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page vi-ix,
<http://www.suhakam.org.my>

⁴⁷ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii., <http://www.suhakam.org.my>

being detained under Section 73 for a period of time that is beyond what is "strictly necessary".⁴⁸

In 1988, the ISA was amended in order to validate detentions made under Section 8(1) although the relevant detainees are detained in a place of detention that is different from the one as directed by the Minister. This amendment increases the possibility of incommunicado detention and consequently, the inherent danger of inhuman or degrading treatment.⁴⁹

In 1989, the ISA was amended to exclude any judicial review of the grounds of detention made under Section 8 of the ISA. Thus detainees held under this section are not only denied a fair and public trial, they are also denied their minimum right to an effective opportunity to be heard promptly by an independent Judiciary which may decide on the lawfulness of their detention and may order their release if their detention were to be found unlawful. This increases the risk of individuals being detained beyond the framework of the ISA, thereby resulting in the increased danger of individuals being subjected to arbitrary detention.⁵⁰

2.2.1.4 JUDICIAL REVIEW BEFORE 2009

The ghost of **Liversidge v Sir John Anderson**⁵¹ and **R v Halliday**⁵² still haunt our system of justice, in which Judicial Review for preventive detention is a subject test as governed

⁴⁸ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii., <http://www.suhakam.org.my>

⁴⁹ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page viii., <http://www.suhakam.org.my>

⁵⁰ Suruhanjaya Hak Asasi Manusia Malaysia – Review of the ISA 1960, page ix <http://www.suhakam.org.my>

⁵¹ **Liversidge v Sir John Anderson** [1942] AC 206

⁵² **R v Halliday** [1917] AC 260

by **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁵³. It went all back to the 16th Century when the administrative law yet to develop.

2.2.2 THE LAW ON PREVENTIVE DETENTION AFTER 2009

Discussion above has been noted as 'History' when **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835**⁵⁴, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁵⁵, and **Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113**⁵⁶ came into picture.

Although Darma Suria was not detained under the ISA, but we have no doubt appreciate that Darma Suria is the recent case which change the standing of all preventive detention's statutes, including our beloved ISA. In this case, the appellant was arrested pursuant to the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 on 4.4.2008. An order was made by the Minister under Section 4(1) of the Ordinance detaining the appellant for a period of two years. The appellant then moved to the High Court for an order of habeas corpus. The High Court declined to grant the order, hence this appeal. The issue that arose was whether the Minister had acted lawfully in classifying the activity the appellant was alleged to be involved in, which was the smuggling of stolen cars out of Malaysia, as constituting an act prejudicial to public order.

It is to be noted that the section says "if the Minister is satisfied". The first question that has to be determined is whether that phrase imports a subjective or an objective element. By referring to **Merdeka University Bhd v Government of Malaysia [1982] 2 MLJ 243**⁵⁷, the

⁵³ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

⁵⁴ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

⁵⁵ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301

⁵⁶ *Sivarasa Rasiah v Badan Peguam Negara and Anor* [2009] MLJU 01113

⁵⁷ *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243

words used by the statute were "If, the Yang di-Pertuan Agong is satisfied". In interpreting that statutory formula, Suffian LP said that in the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable. Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance⁵⁸ it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.

There is a principle of ancient repute that—

"...where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied." Reg. v Home Secretary ex p. Khawaja [1984] 1 AC 74 , per Lord Scarman.

And as Lord Kingarth observed in **Cameron v Gibson [2005] CSIH 83**⁵⁹:

⁵⁸ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

⁵⁹ *Cameron v Gibson* [2005] CSIH 83

“Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made ultra vires ... when power is given by Parliament to administrative bodies or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have ...”

That then brings us to the central question whether the activity in which the appellant was involved in was prejudicial to public order. If it is not, then habeas corpus must issue. This is because whether particular activity comes within the scope of being prejudicial to public order is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter upon that question. This much is made clear by the several authorities on the subject and is implicit from the leading case of *Re Application of Tan Boon Liat* [1976] 2 MLJ 83⁶⁰ where Abdooldcader J said:

*“The expression ‘public order’ is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification. The Supreme Court of India exhaustively discussed the import of the term ‘public order’ in *Romesh Thappar v State of Madras* AIR 1950 SC 124, 127 (in particular at page 127) when it established the principle that the maintenance of public order is equated with the maintenance of public tranquillity, that ‘public safety’ is a part of the*

⁶⁰ *Re Application of Tan Boon Liat* [1976] 2 MLJ 83

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⁶⁰ *Re Application of Tan Boon Liat* [1976] 2 MLJ 83

wider concept of 'public order', that 'public safety' ordinarily means security of the public or their freedom from danger and in that sense will include the securing of public health, that is to say, anything which tends to prevent dangers to the public health may also be regarded as securing public safety."

In our judgment whether an act of smuggling is prejudicial to public order depends on the facts and circumstances of each case. If it disrupts or has the potential to disrupt the even tempo of the life of the community it would prejudice public order. It would also come within the scope of public order where it disrupts or has the potential to disrupt public safety and tranquillity.

Does the activity engaged in by the appellant come within the foregoing test? It does. What the appellant was engaged in was the illegal export of stolen cars. An act of smuggling stolen cars may per se not be prejudicial to public order but this is a case in which a syndicate was involved, as the grounds of detention clearly state. This activity had the effect of providing for thieves and would be thieves a ready market for the disposal of stolen cars. This has the obvious potential to disrupt public tranquillity. Because no car may be safe from being either robbed or stolen and its recovery made impossible by reason of the appellant's assistance in their disposal. There is no doubt also that the activity engaged in by the appellant had the potential to disrupt the even tempo of the life of the community. The even tempo of life of the community is disrupted when there is serious risk of loss of property through theft. It follows that a reasonable decision-maker when faced with the facts set out in the statutory statement would have concluded that the appellant's activity was prejudicial to public order. The Minister in the present instance did not therefore commit any error of law in making the order he did. Therefore, the judges of the Federal Court dismissed the appeal.

It is pertinent to note that the phrase 'if the Minister is satisfied' has imports an objective element as discussed above. When there is a question of law, Gopal Sri Ram FCJ held that the court is the final arbitrator upon the question. By looking at the judgment made by the Federal Court in this regard, it is utmost important to realize that **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁶¹ has been overruled by this case. At the same time, this case had neutralized the ouster clause of the preventive detention. The court hereby becomes the primary reviewer and justice is no longer in the hand of the Minister and the best example would be the case of Darma Suria which gave fresh air to the people and a new believe that the judiciary is not bound by the executive's decision.

In a prominent case, **Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301**⁶², although it is not a preventive detention case, nevertheless, its new principle given by Gopal Sri Ram FCJ binds every other cases thereof. The Honourable FCJ stated that the constitution is a document sui generis governed by interpretive principles of its own which imposes a duty on the court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. Further in interpreting provisions appearing in Part II of the Constitution the court must bear in mind Article 8 that guarantees fairness in all legislative, administrative and judicial action. All legislative, in my view, includes the ISA. Therefore, this case also overruled **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁶³, as the Federal Court held as follows:-

'It is equally our misfortune that we find ourselves in disagreement with the contrary view expressed by Suffian LP in the same case and in Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2

⁶¹ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

⁶² *Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301*

⁶³ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129*

MLJ 129. In our judgment what art 5(1) strikes down is all forms of state action that deprive either life or personal liberty bearing a meaning of the widest amplitude in contravention of substantive or procedural law.'

Decision in **Lee Kwan Woh v Public Prosecutor** [2009] 5 MLJ 301⁶⁴ has been reaffirmed by Gopal Sri Ram FCJ in **Sivarasa Rasiah v Badan Peguam Negara and Anor, Rayuan** Sivil No. 01-8-2006 (W), unreported⁶⁵. Reads:-

'In three recent decisions this Court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are Badan Peguam Malaysia v Kerajaan Malaysia [2008] 1 CLJ 521 , Lee Kwan Woh v Public Prosecutor [2009] 1 LNS 778 and Shamim Reza v Public Prosecutor [2009] 6 CLJ 93 . The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept.'

⁶⁴ Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301
⁶⁵ Sivarasa Rasiah v Badan Peguam Negara and Anor [2009] MLJU 01113

It is pertinent to note that law includes procedural law in the new development, and the old timer **Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia**⁶⁶ must not be followed anymore.

Preventive detentions' law develop with the creation of **Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835**⁶⁷. Although the detainee was not detained under the ISA, yet that particular preventive detention which has a different purpose but similar in nature. Therefore, Objective Test is now the new test for judicial review.

2.3 ADVISORY BOARD

Advisory board comprises of members from the Attorney General Chambers who is on the list to be appointed as the Judicial Commissions. These people are the Chairman of the board, who conducted reviews on the detention. Can they be independent?

In **SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negara, Malaysia [2010] 1 MLJ 149**,⁶⁸ an appeal against the refusal of the High Court to issue habeas corpus for the appellant's release from custody. On 17.11.2008, the Minister for Home Affairs, the first respondent, made an order directing the appellant's detention for a period of two years pursuant to Section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. A statutory statement setting out the facts and grounds of his detention (also dated 17.11.2008) was served upon the appellant. On 18.11.2008, the appellant

⁶⁶ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

⁶⁷ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others 2009 MLJU 0835*

⁶⁸ *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negara, Malaysia* [2010] 1 MLJ 149

made representations against the making of the order to the advisory board constituted under Article 151 of the Federal Constitution. Under clause (1)(b) and by virtue of Section 6(1) of the Ordinance, the board must consider the representations and make its recommendations thereon to the Yang di-Pertuan Agong within three months of receiving the representations in question or within such longer period as the Yang di-Pertuan Agong may allow. On 17.3.2009, an application for an order of habeas corpus was filed, heard and dismissed by the High Court. The main grounds in support of the appeal is that the detention is bad because the board failed to make its recommendations within the constitutionally and statutorily prescribed three month period; no question of any extension arising in this case. In the alternative it is submitted that at best the burden of showing that the recommendations were made within time had not been discharged by the respondents. This brings into sharp focus on the uncertainty.

Gopal Sri Ram FCJ held:-

“It is for the respondents to prove that the constitutional and statutory safeguards embodied in Article 151 and Section 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute. When considering whether a restraint upon liberty is in accordance with law it is to the evidence furnished by the detaining authority that a court must turn in the usual way. And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection.”

Thus, the common law right of access to justice is part of the "law" to which Article 5(1) of the Federal Constitution refers. In other words, a law that seeks to deprive life or personal liberty is unconstitutional if it prevents or limits access to the courts. Moreover, by letting the executive to make their decision of whether or not they are satisfied with the grounds of detention and thus prevents the court from interfering is definitely unconstitutional. Therefore, it is to be concluded that law which limits the exercise of court in judicial review is hereby unconstitutional.

2.4 PUBLIC OPINION

Some individuals have been arrested and detained on the grounds which do not fit into the definition of the purpose of the creation of the ISA in which those offences should be prejudicial to the national security of the country. However, those detentions i.e. on political grounds such as Mr Karpal Singh's detention in year 1986; detention of lawyers who exercise their right to be heard in view of repealing and review the ISA; detention for allegedly counterfeiting coins; human trafficking; Raja Petra's detention in 23.9.2008 as an editor of the popular political blog of Malaysia Today; and etc. Does all the above satisfy the criteria of being prejudicial to the national security of the country as per the purpose of setting up the ISA at the very first place? These situations could have been dealt with under the relevant laws in Malaysia.

2.5 SUMMARY

There are various areas ought to be reviewed, i.e. judicial review on Sections 8 and 73, members of the advisory board, Part XI of the Federal Constitution, to stop the abuse of ISA for political purposes and etc.

3.0 INTRODUCTION

Historically in Britain preventive legislation has been used to combat terrorism in the past. Although many writers such as Fenwick (2002) suggest that preventive detention to combat terrorism in Britain was first introduced in the 1974 Prevention of Terrorism (Temporary Powers) Act (PTA), as Blum (2008) notes, it was the 1939 Prevention of Violence (Temporary Powers) Act (PVA) which introduced powers to detain people for up to seven days. Initially this act was only to last for two years, but it wasn't allowed to expire until 1952 and only repealed in 1973. The PTA was a reintroduction of the PVA, mostly as a response the bombing of two pubs in Birmingham that year, with seven days detention that needed to be justified by reasonable suspicion of involvement in acts of terrorism. However, the PTA also introduced the ability to hold someone without access to a lawyer for the first 48 hours. Like the PVA, the PTA was continually renewed, but was also rewritten on several occasions. According to Blum, 27,000 people were arrested between 1973 and 1996 under the act, although only 15% were ever charged with a crime.

UK has had lengthy experience with indefinitely detaining suspected terrorists without trial in Northern Ireland which allowed the government to detain terrorist suspects without charges for 72 hours, not even needing the former 'reasonable' suspicion. As Blum notes, although these powers were suspended in 1987 in favour of the provisions of those in the PTA, the Act was still renewed in Parliament until 2000.

Under the PTA⁶⁹ the Secretary of State for the Home Department (hereinafter, "Home Secretary") could authorize the detention of a person for up to seven days. The use of these powers was controversial and in response to increasing violence. In 1988, the European Court of Human Rights ruled that the detention was a breach of Article 5(3) of the European Convention on Human Rights (ECHR)⁷⁰ unless the detention was judicially authorized.⁷¹ This ruling resulted in the government derogating from Article 5(3) in order to lawfully retain this provision of the PTA.⁷² The derogation was automatically renewable, but expired with the expiration of the PTA.

3.1 PREVENTIVE DETENTION'S POSITION

3.1.1 BEFORE 11.9.2001

The reason why both the above sets of powers were not renewed after 2000 was that that year saw the first permanent act dealing with preventive detention in the UK, the 2000 Terrorism Act (TA). The TA incorporated the provision of similar powers to both the PTA and PVA allowing for seven days detention without charge on the grounds of reasonable suspicion. It is worth noting that although it did not grant extra powers, this making permanent of previously temporary legislation occurred before the attacks of 11.9.2001. It was only in 2003 that the TA was amended to include preventive detention for 14 days. Additionally, as Fenwick comments "The reality behind the 'temporary' provisions appears to be that for much of the twentieth century UK governments have kept emergency legislation on file or in suspension, ready to be brought into law at short notice..."

⁶⁹ Prevention of Terrorism (Temporary Provisions) Act 1984, c. 8

⁷⁰ The ECHR was incorporated into the domestic law of the United Kingdom by the Human Rights Act 1998, c. 42, at http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1 (official source). See further The European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 222, at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁷¹ *Brogan and others v UK*, (1989) 11 EHRR 117

⁷² *Brogan and others v UK*, (1989) 11 EHRR 117 This derogation was later withdrawn by the Human Rights Act (Amendment) Order 2001, SI 2001/1216 at <http://www.opsi.gov.uk/si/si2001/20011216.htm>

The resulting internment of almost 2,000 predominantly Catholic men was stated to lead to greater civil disturbances and a "diminished respect for the rule of law in Northern Ireland."⁷³ It was widely reported that the use of internment was "among the best recruiting tools the Irish Republican Army ever had."⁷⁴ It was against this experience and background that the government has had to determine the most effective, least controversial method to address individuals whom the government suspected of being terrorists that was also least likely to succumb to legal challenges.

This issue of how to detain terrorist suspects was tackled during the drafting of the Terrorism Act 2000,⁷⁵ which replaced the temporary provisions of the PTA. As part of this process, alternative options to derogation from the ECHR were considered. The Terrorism Act was enacted to modernize anti-terrorism legislation and apply it to the whole of the UK, rather than just Northern Ireland. The Terrorism Act attempted to address all forms of terrorism with an "appropriate and effective range of measures, which are [sufficiently flexible and] proportionate to the reality of the threats that we face and are of practical operational benefit and enable the UK to cooperate more fully in the international fight against terrorism."⁷⁶ It was finally decided that individuals could be detained for up to forty-eight hours after arrest without charge, and that the responsibility for extending detention for up to an additional fourteen days should rest with a judicial authority.⁷⁷ Critics of the Terrorism Act regarded this provision as providing for "incommunicado detention" and

⁷³ MARY O'RAWE, OPEN SOCIETY JUSTICE INITIATIVE, ETHNIC PROFILING, POLICING, AND SUSPECT COMMUNITIES: LESSONS FROM NORTHERN IRELAND 92 (2005) at 92, at http://www.justiceinitiative.org/db/resource2?res_id=102731

⁷⁴ Former IRA Commander Jim McVeigh, quoted in M. O'Connor and C. Rumann, Into the Fire: How to avoid getting burned by the same mistakes made fighting Terrorism in Northern Ireland, 24 Cardozo L. Rev. 1657, 1662 (2005).

⁷⁵ Terrorism Act 2000 c. 11 (as amended) at http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1

⁷⁶ BBC News, Head to Head: New Terrorism Act, Feb. 11, 2001 at http://news.bbc.co.uk/1/hi/uk_politics/talking_politics/1178705.stm.

⁷⁷ Terrorism Act 2000, c. 11, sch. 8, (as amended) at http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_21#sch8-pt3 (official source). Part III permits a judicial authority to extend detention for up to seven days, later extended to fourteen days by the Criminal Justice Act 2003, c.44, § 306 at http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_22#pt13-pb1-l1g306.

unnecessary, as individuals previously detained under similar provisions were rarely charged with a terrorist offense. Despite these criticisms, the period of detention has been extended by successive acts from forty-eight hours to seven days by the Terrorism Act 2000; from seven days to fourteen days by the Criminal Justice Act 2003⁷⁸ and, from fourteen days to twenty-eight days by a highly contentious provision in the Terrorism Act 2006⁷⁹.

3.1.2 AFTER 11.9.2001

After the events of 11.9.2001, the Anti-Terrorism, Crime and Security Act (2001) (ATCSA) was introduced which allowed for the indefinite detention or deportation of any foreign national suspected of being engaged in terrorist activity (Blum, 2008). However, as Blum (2008:16) notes these powers did not survive as "The government ultimately repealed the provisions of ATCSA dealing with indefinite detention based on a House of Lords Judicial Committee December 2004 ruling that such powers were incompatible with articles of the European Commission on Human Rights relating to the right to liberty and the right to freedom from discrimination. The Committee found the indefinite detention powers to be discriminatory as they only applied to foreign nationals, not to British citizens, and that they were not proportionate to the threat Britain faced from terrorism." The provisions of this act during its three year life affected 17 foreign nationals in Britain (Blum, 2008).

A further Terrorism Act of 2006 (TA06) created provisions for 28 days preventive detention, but this was subject to strict judicial review of the detentions (Blum, 2008). During the summer of 2007 there were attempts to extend the period of preventive detention to 56 days, however, as Blum (2008) points out, both the four options presented

⁷⁸ Criminal Justice Act 2003, c.44, § 306 at http://www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_22#pt13-pb1-l1g306 (official source).

⁷⁹ Terrorism Act 2006, c. 11, § 23 at http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_4#pt2-pb2-l1g23.

for this and proposed civil emergency legislation to extend the period of detention by 30 days were defeated in Parliament.

The United Kingdom has faced the issue of terrorism for several decades. It has more recently faced the issue of legislating against the terrorist threat whilst complying with the European Convention on Human Rights. One of the UK's anti-terrorism measures is the pre-charge detention of terrorist suspects for up to twenty eight days without charge. During the summer of 2008 the government attempted to further extend this period to forty two days, but was ultimately unsuccessful. The continued efforts of the government to protect the national security of the UK whilst protecting the civil liberties of its citizens is an ongoing struggle with no clear solution.

In Counter-Terrorism Policy and Human Rights 28 days, Intercept and Post-charge Questioning, 2007-08, it states:-

“We strive to achieve the appropriate balance between the measures necessary to deal with the very real threat to national security posed by terrorism and the need to avoid diminishing the civil and human rights of the population.”⁸⁰

The current governing pre-charge detention to counter terrorism laws of the UK allow the police, under certain specified circumstances, to arrest individuals without a warrant who are reasonably suspected of being terrorists.⁸¹ Once arrested, these terrorist suspects may be detained, without charge, for up to twenty-eight days to allow the police to obtain, preserve, analyze or examine evidence for use in criminal proceedings. This power of the

⁸⁰ <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>

⁸¹ Terrorism Act 2000 c. 11, § 41 (as amended) at http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1 (official source).

police to arrest and detain individuals based upon reasonable suspicion only has been described as one of "the most important powers available to the police in the fight against terrorism, the principal usefulness of the power and it allows arrests to be made at an earlier stage than if there was a requirement for suspicion of a specific offence."⁸² This may have both a disruptive and preventative impact on any terrorist plans that may be in process.

The requirement for pre-charge detention is once a person has been arrested by the police, he may be detained without charge for an initial period of forty-eight hours. Additional periods of detention, in seven day increments, may then be granted by magistrates, up to a total of fourteen days. Detention from fourteen to twenty-eight days may then be granted by a High Court judge. Applications for the extensions of detention are made by the Crown Prosecution Services' Counter Terrorism Division, rather than the police.

While the main impetus of the arrest may "have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, legislation does not allow continued detention on this basis."⁸³ The detention may only be extended if a judicial authority is satisfied that the extension is necessary to obtain or preserve relevant evidence; permit the completion of an examination or analysis of any relevant matter with a view to obtaining evidence; and

⁸² The Government Reply to the Fourth Report from the Home Affairs Committee Session 2005-6, H.C. 910, Terrorism Detention Powers, 2006-07, Cm. 6906, ¶ 22, at <http://www.official-documents.gov.uk/document/cm69/6906/6906.pdf>.

⁸³ THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>

the investigation connected with the detention is being conducted diligently and expeditiously.⁸⁴

The first two requirements require the police or prosecutors to inform the court of the precise details of the investigation, the expected date of completion, what the investigation will achieve and what difference any evidence obtained as a result of the investigation will make to any charging decision. To be satisfied that the investigation is being conducted diligently and expeditiously the court must be shown that the investigation has been carried out as quickly as reasonably possible.⁸⁵

These issues can be proven both with non-sensitive material presented in the presence of the defense attorney and with sensitive material that is presented in the absence of the defense attorney. The government maintains that public interest immunity issues do not arise as, whilst the individual is being deprived of his liberty, it is for a short, defined time and not in the same venue as a criminal trial.⁸⁶

The requirements for applications for the extension of pre-charge detentions are extensive and the courts are careful in considering the application, given the result is the deprivation of an individual's liberty. In Operation Gamble in Birmingham, applications to detain nine men for seven to fourteen days were refused for two suspects, who were subsequently

⁸⁴ Terrorism Act 2000 c. 11, sch. 8 part 3 (as amended) at http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1 (official source).

⁸⁵ Home Office, *Scrutiny of Pre-charge Detention in Terrorist Cases*, at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/cps-pre-charge-detention.pdf?view=Binary> (last visited Aug. 27, 2008).

⁸⁶ THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

released, and were not granted for seven days for the remaining seven suspects, who were subsequently charged.⁸⁷

The period of detention under the Terrorism Act 2006 is subject to a sunset provision, requiring that Parliament approve the extension of detention from fourteen to twenty-eight days annually by an affirmative resolution debate in both Houses of Parliament.⁸⁸ This was recently renewed by Terrorism Act 2006 (Disapplication of Section 25) Order 2008 on 25.7.2008.⁸⁹

Few years ago, the United Kingdom's government has also been debate about extending preventive detention from twenty eight days up to forty two days, as such, on 11.6.2008 the House of Commons, by a narrow majority of nine, passed a Counter-Terrorism Bill,⁹⁰ to further increase the pre-charge detention period from twenty eight to forty two days. The passage of the bill through the House of Commons was highly contentious, and rumors, which were strongly denied, surfaced that the government had entered into an improper agreement with the Democratic Unionist Party (DUP) in return for their votes on the bill.⁹¹

The provisions of the bill extending pre-charge detention were defeated in the House of Lords by a majority of 309 votes to 118. The provisions have been completely removed from the bill, rather than amended. Newspapers reported that this heavy defeat was humiliating for Prime Minister Gordon Brown who had attempted to garner cross-party

⁸⁷ Home Office, *Scrutiny of Pre-charge Detention in Terrorist Cases*, at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/cps-pre-charge-detention.pdf?view=Binary> (last visited Aug. 27, 2008)

⁸⁸ Terrorism Act 2006, c. 11, § 25 at http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060011_en_4#pt2-pb2-l1g23 (official source).

⁸⁹ The Terrorism Act 2006 (Disapplication of Section 25) Order 2008, SI 2008/1745, at http://www.opsi.gov.uk/si/si2008/uksi_20081745_en_1

⁹⁰ Counter-terrorism Bill, [HL Bill 65], 2007-08, as brought from the Commons including the pre-charge detention provisions at <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/2008065.pdf>. The most current version of the Bill is the Counter-terrorism Bill, [HL Bill 82], 2007-08 at <http://www.publications.parliament.uk/pa/ld200708/ldbills/082/2008082.pdf>

⁹¹ Phillipe Naughton, *Gordon Brown denies 42-day terror deal with DUP*, June 12, 2008, Times (London) at <http://www.timesonline.co.uk/tol/news/politics/article4119881.ece>

support for the measure.⁹² The government immediately prepared a new Counter Terrorism (Temporary Provisions) Bill to be introduced "if and when the need arises."⁹³ The bill is significantly shorter than the rejected provisions and intends to "enable the police and prosecutors to do their work – should the worst happen, should a terrorist plot overtake us and threaten our current investigatory capabilities."⁹⁴ The bill amends the Terrorism Act 2000 and permits the Director of Public Prosecutions to apply to the courts to detain a suspect already for up to forty two days. The use of the powers would be reviewed and reported upon by the independent reviewer of the terrorism legislation within six months of the use of the power and the report is to be laid before Parliament. A sunset provision is included in the bill, causing the provisions to cease to have effect after a period of sixty days.

3.2 THE PURPOSE OF PRE-CHARGE DETENTION IN THE UK

The purpose is solely for preventive has been shunned by the government in somewhat contradictory statements that indicate the initial use of pre-charge detention may be for preventive purposes, but that its continued use is not permitted on this basis. The government claims the use of pre-charge detention for preventive purposes is misleading and that "while an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests at any point during an investigation, the legislation does not allow the continued detention on this basis."⁹⁵

⁹² Nico Hines and David Byersordon, *Brown's last-ditch appeal fails as Lords reject 42-day Bill*, The Times (London) Oct. 13, 2008, <http://www.timesonline.co.uk/tol/news/politics/article4935478.ece>.

⁹³ Home Office, *Home Secretary's statement on the counter-terrorism bill*, 13 October 2008 at <http://security.homeoffice.gov.uk/news-publications/news-speeches/counter-terrorism-bill-statement>.

⁹⁴ Home Office, *Home Secretary's statement on the counter-terrorism bill*, 13 October 2008 at <http://security.homeoffice.gov.uk/news-publications/news-speeches/counter-terrorism-bill-statement>.

⁹⁵ THE GOVERNMENT REPLY TO THE TWENTY-FOURTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2005-06 HL PAPER 240, HC 1574, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION, 2006-07, Cm. 6920, at <http://www.official-documents.gov.uk/document/cm69/6920/6920.pdf>.

The primary purpose of pre-charge detentions is to "secure sufficient admissible evidence for use in criminal proceedings." However, as indicated in the previous statement, pre-charge detention may, in its initial use, be used for preventive purposes and the government further continues that: "there is no legal basis in making an arrest on the grounds of protecting the public, but it is evident that the police have a duty to act where it is necessary for them to do so."⁹⁶

Therefore, to place the new bill in context and show the struggles faced by both the government and Parliament in balancing the right of civil liberties against national security, the original provisions of the Counter-Terrorism Bill. At the end of the day, the purpose of a pre-charge detention is still down to prevention only.

3.3 PUBLIC OPINION

There are lots of criticisms about the extension of the detention period. Other than within the Parliament, the people of the United Kingdom criticise the said extension too. In regards of a number of Parliamentary reports are strongly critical of the pre-charge detention provisions in the bill and many members have been outspoken about their dislike of its inclusion in the bill, claiming that the government has become fixated on extending the pre-charge detention period for political reasons.⁹⁷

Several high profile members of the House of Lords have spoken out against the bill, including the former Labour Lord Chancellor, Lord Falconer, the former Director General of

⁹⁶ THE GOVERNMENT REPLY TO THE NINETEENTH REPORT FROM THE JOINT COMMITTEE ON HUMAN RIGHTS SESSION 2006-07 H.L. PAPER 157, H.C. 394, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: 28 DAYS, INTERCEPT AND POST-CHARGE QUESTIONING, 2007-08, Cm 7215, ¶ 22 at <http://www.official-documents.gov.uk/document/cm72/7215/7215.pdf>.

⁹⁷ 8 July 2008, Parl. Deb., H.L. (5th ser.) (2008) 640

the Security Service Baroness Manning Buller, the former Metropolitan Police Commission and two former Law Lords, Lord Steyn and Lord Lloyd of Berwick. Baroness Manning Buller noted that the bill:

'...represents yet another attempt on the part of the Government to abridge, without sufficient justification, fundamental democratic rights and freedom that have underpinned our society for centuries and which we have defended against tyranny on so many occasions. The Government are putting those rights and freedoms at risk in a reactionary fashion. Terrorists want to undermine our freedoms and way of life by provoking the state into putting in place repressive measures. We therefore risk, in effect, doing their job for them.'⁹⁸

Despite the increases in the number of people being charged with terrorist offenses, opponents of the bill maintain that the increase in the number of people being charged is not evidence of the growing threat of terrorism to the nation, rather which it is indicative that the current laws are working.⁹⁹ The Joint Committee on Human Rights has stated that without a qualitative analysis of the seriousness of the charges brought, it is not "satisfactory to infer an increase in the level of the threat from bare statistics about the number of convictions or the number of people charged with terrorism offenses ... nor is it satisfactory to draw inferences about the level of the threat from the number of active investigations, the number of suspects, nor the number of prosecutions."¹⁰⁰

⁹⁸ 8 July 2008, Parl. Deb., H.L. (5th ser.) (2008) 636.

⁹⁹ *Parliament and the Judiciary*, 2007-08, H.L. 167 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

¹⁰⁰ Joint Committee on Human Rights, *Twenty First Report, Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, 2007-08, H.L. 116/H.C. 635 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/116/11605.htm#a2>.

The order issued by the Home Secretary which enables the 'reserve power' to be used has been criticized as limited in many ways. The order under which the extension of pre-charge detention to forty two days is authorized has been described as essentially an executive order that is not subject to any "meaningful opportunity for that assertion to be tested by independent scrutineers"¹⁰¹ and over which Parliament may only operate as safeguard to a limited extent.¹⁰² Critics have noted that "by the time [it] expresses a view on whether the reserve power should be made available it is likely that the full forty-two day period will have expired,"¹⁰³ thus allowing individuals to be detained for forty two days at the "subjective unfettered discretion of the Home Secretary."¹⁰⁴

At last, the government appears to have dropped this for the present. However, preventive detention has not just been used in relation to terrorist threats it has also been used during both world wars. As Blum (2008) notes, Regulation 14B, which was enacted in 1915, gave powers which enabled the Home Secretary to order the detention of anyone they thought endangered public safety or the nation. Similarly, Regulation 18B gave similar powers to the Home Secretary during World War II, and as Blum (2008) notes, over 2000 people were detained under these powers. However, as Blum (2008) points out, the difference between these powers and are those for Northern Ireland was that the latter were not uncontrolled executive powers but pre-trial detention which meant there could be judicial review of the detention.¹⁰⁵

¹⁰¹ House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 32 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>

¹⁰² House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, 2007-08, H.L. 167, ¶ 32 at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/167/167.pdf>.

¹⁰³ Joint Committee on Human Rights, *Ninth Report, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, 2007-8, H.L. 50/H.C. 199 ¶ 13 at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/50/50.pdf>. [Back to Text]

¹⁰⁴ 8 July 2008, Parl. Deb., H.L. (5th ser.) (2008) 637.

¹⁰⁵ <http://leftwingcriminologist.blogspot.com/2008/12/brief-look-at-uks-history-of-laws-for.html>

The law in the United Kingdom on preventive detention is settled from the abovementioned, since its regime has moved from seven days of pre-charge detention to twenty-eight day with access to counsel after forty-eight hours and judicial review every seven days. Moreover, there never has been an argument that pre-charge detention should be indefinite and without access to counsel as there is a maximum limit on pre-charge detention in which the law maker has been constantly reminded that those rights are fundamental to their civil liberties that no one should be held arbitrarily for an unspecified period.

3.4 STANDARD OF REVIEW IN THE UK

In terms of intensity of review in breaches of Fundamental Rights at common law, the court as the primary reviewer applies the heightened and/or most anxious scrutiny test in the case of **Regina -v- Secretary of State for the Home Department ex parte Brind** [1991] 1 AC 696¹⁰⁶, when it was held:-

The courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament. Wednesbury reasonableness and proportionality are different. For decisions infringing fundamental rights, unreasonableness is not equated with "absurdity" or "perversity", and a lower threshold of unreasonableness is used: "whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable." When testing a decision of a lower court: "... the supervising court must bear in mind that it is not

¹⁰⁶ Regina -v- Secretary of State for the Home Department ex parte Brind [1991] 1 AC 696

sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion. For that reason it is "fallacious for those seeking to quash administrative acts and decisions to call in aid decisions of a Court of Appeal reversing a judge's finding, it may be on a question of what is reasonable."

The anxious scrutiny test is expressed as follows:-

In conducting a review of a decision affecting human rights, the Court would subject the decision to the most anxious scrutiny. Where the decision interfered with human rights, the Court would require substantial justification for the interference in order to be satisfied that the response fell within the range of responses open to a reasonable decision-maker. The more substantial the interference, the more is required to justify it¹⁰⁷. This test was rejected in *Smith and Grady v UK* [1999] 29 EHRR 493 because the threshold of review had been placed so high in *Smith* that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicant's rights answered a pressing social need or was proportionate to a legitimate aim.

Pursuant to **R (On the Application of Begum Begum) v Denby High School [2006] UKHL 15**¹⁰⁸, it was held that an intensity of review in European Union Human Rights violation must be at least the most anxious scrutiny test if not more.

However, in preventive detention cases under the European Court of Human Rights regime, the intensity of review is pitched at the closest and the most anxious scrutiny level

¹⁰⁷ *Ex p Smith* [1996] QB 517

¹⁰⁸ *R (On the Application of Begum Begum) v Denby High School* [2006] UKHL 15

in the case of **A v SS for Home Dept [2004] UKHL 56¹⁰⁹** and also **SS for Home Dept v MB [2006] EWHC 1000¹¹⁰**.

Carnwath LJ in **R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116** held:-

'The expression "anxious scrutiny" derives from the speech of Lord Bridge in Bugdaycay v Secretary of State [1987] AC 514, 531, where he said:-

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

3.5 SUMMARY

The UK's laws develop at the high speed. The ghost of **Liversidge v Sir John Anderson [1942] AC 206¹¹¹** had been buried by **R v Inland Revenue Commissioners, ex parte Rossminster [1980] AC 952¹¹²**. Privy Council held that Objective Test is the test for the review. Furthermore, as discussed in Para 3.4, the UK is achieving a higher standards of review for preventive detention, and finally reaches the closest and the most anxious scrutiny level.

¹⁰⁹ A v SS for Home Dept [2004] UKHL 56

¹¹⁰ SS for Home Dept v MB [2006] EWHC 1000

¹¹¹ Liversidge v Sir John Anderson [1942] AC 206

¹¹² R v Inland Revenue Commissioners, ex parte Rossminster [1980] AC 952

4.0 INTRODUCTION

India is one of the few countries in the world where laws allowing preventive detention enjoy constitutional validity even during peacetime. In contrast, the European Court of Human Rights has long held that such laws are illegal under the European Convention on Human Rights regardless of the safeguards inherent in them to prevent their misuse.¹¹³

Normally preventive detention is resorted to against enemy aliens in emergencies such as war when the evidence in possession of the detaining authority is not sufficient to secure the immediate conviction of the detenu by the normal legal process. In India the history of preventive detention dates back to the early days of the British rule when under the Bengal Regulation— III of 1818 (the Bengal State Prisoners Regulation) the government was empowered to detain anybody on mere suspicion. There was also Rule 26 of the Rules framed under the Defence of India Act 1939, again a war time legislation, which allowed the detention of a person if it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defence and safety of the country¹¹⁴.

In the normal course of things preventive detention laws should have lapsed after India attained Independence; but perhaps as the Republic of India had its birth amidst the ravages of civil commotion involving huge loss of lives and property, the framers of our Constitution decided to retain preventive detention as a means to curb anti-national activity. Thus, the Preventive Detention Act was passed by Parliament in 1950. After the

¹¹³ 'Preventive detention an anachronism' from the Online Edition of India's National Newspaper posted on Tuesday, 7.9.2004

¹¹⁴ Emp. vs. Sibnath A. 1945 P.C.156

expiry of this Act in 1969, the Maintenance of Internal Security Act (MISA) was enacted in 1971, followed by its economic adjunct the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974 and the Terrorism and Disruptive Activities (Prevention) Act (TADA) in 1985. Though MISA and TADA have been repealed, COFEPOSA continues to be operative along with other similar laws such as the National Security Act (NSA) 1980, the Prevention of Blackmarketing and Maintenance of Essential Commodities Act 1980 and the draconian Prevention of Terrorism Act (POTA) 2002; not to mention laws with similar provisions enacted by the State governments.

It is unbelievable that our Constitution allows the government to pass preventive detention laws against its own citizens in the name of national security and "maintenance of public order" as per Entry 9 of List I and Entry 3 of List III of the Constitution. Assuming that the situation in the country at the time of Independence warranted such legislation, there is still no compelling wisdom in allowing these laws to continue particularly when the circumstances identified in the aforementioned Entries do not exist today. Moreover, in the absence of proper safeguards, preventive detention has been grossly misused, particularly against the Dalits and the minorities. For instance, in May last year a Division Bench of the Madras High Court penalised the Kancheepuram Collector and a police Inspector to pay a sum of one lakh rupees for illegally detaining one Thameem Ansari under the Goondas Act¹¹⁵.

Another law which is misused is the COFEPOSA, under which a person found in possession of contraband can be imprisoned without trial and bail for a period of one year despite the possibility that the person may have been duped into carrying the contraband, because, it is often seen that baggage carried by people in good faith on behalf of their friends or relatives contains smuggled goods and they end up in prison under

¹¹⁵ The Hindu, May 3, 2003

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¹¹⁵ The Hindu, May 3, 2003

COFEPOSA. Unfortunately, the law does not recognise innocence even in such genuine cases.

4.1 ADVISORY BOARD

Normally before a preventive detention case is brought before the High Court, a three member Advisory Board headed by a sitting High Court Judge is constituted by the government to examine whether the detention is justified or not. Surprisingly, the proceedings of the Board are confidential except for that part of the report which expresses the opinion of the Board. But what is more appalling is the denial of the detenu's fundamental right to be represented by a professional lawyer before the Board. This is a blatant violation of human rights and goes against Article 22(1) of the Constitution, which says "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice." Thus in a majority of cases the Advisory Board upholds the detention due to lack of proper legal representation on behalf of the detenu.

It takes up to six months or sometimes even more before a habeas corpus petition is filed and taken up by the High Court, and till such time the detenu languishes in prison under extremely trying conditions. No wonder, as per the NHRC report released in May last year, out of a total of 3,04,893 prisoners in India, 2,25,817 are awaiting trial. In other words, more than 74 per cent of the total prison population are undertrials. It is therefore clear that preventive detention is harmful to a secular democracy like India as it is extremely prejudicial to personal liberty. As the existing laws are more than sufficient to deal with any offence, the government must seriously consider abolishing all preventive detention laws

which have consistently exposed not only the shabby investigative skills of the sponsoring authority, but also their illogical and mechanical application by the detaining authority.¹¹⁶

4.2 INDIAN'S PREVENTIVE DETENTION ACT 1950

With regards to the law of prevention and detention in India, there are a couple of statutes pertaining to it, i.e. Preventive Detention Act of 1950; Terrorist and Disruptive Activities (Prevention) Act of 1985; Prevention of Terrorism Act of 2002; Unlawful Activities (Prevention) Amendment Act of 2004 and etc. For the purpose of this research, the only act which will be discussed hereinafter is the Indian's Preventive Detention Act of 1950, in which it resembles the Malaysian's ISA in many ways, but different in its own special way.

4.2.1 PROCEDURE RIGHTS

In India, procedure rights of a detainee is utmost important. In virtue of **State of Bombay v Atma Ram**¹¹⁷, Kania Chief Justice referred in paragraph 16 on page 165 of his judgment to the "**procedural rights of the detenu**" mentioned in Article 22(5) of the Indian's Constitution. Sastri J. in his judgment at page 166 said this:-

'If this procedure [prescribed by clauses (5) and (6) of article 22] is not complied with, detention under the Act [Preventive Detention Act, 1950] may well be held to be unlawful, as it would then be deprivation of personal liberty which is not in accordance with the procedure established by law.'

¹¹⁶ www.hindu.com/op/2004/09/07/.../2004090700101500.htm

¹¹⁷ State of Bombay v Atma Ram AIR 1951 SC 157

Article 22(5) gives a right to the detained person to be furnished with the grounds on which the order has been made and that has to be done as soon as may be. The second right given to such person is of being afforded 'the earliest opportunity of making a representation against the order.

Indian Supreme Court, namely **State of Bombay v Atma Ram**¹¹⁸, **Dr Ram Krishan Bhardwaj v State of Delhi**¹¹⁹ and **Rameshwar Shaw v District Magistrate, Burdwan & Anor**¹²⁰. These are decisions on the Preventive Detention Act No. 4 of 1950 and to understand the cases it is first necessary to give relevant extracts from the Act.

Section 3 thereof gives power to make orders detaining certain persons and reads:-

'(1) The Central Government or the State Government may-

(a) if satisfied with respect to any person that with a view to preventing him from acting in a manner prejudicial to:-

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

¹¹⁸ State of Bombay v Atma Ram AIR 1951 SC 157

¹¹⁹ Dr Ram Krishan Bhardwaj v State of Delhi AIR 1953 SC 318

¹²⁰ Rameshwar Shaw v District Magistrate, Burdwan & Anor AIR 1964 SC 334.

(b) ... , it is necessary so to do, make an order directing that such person be detained.

(ii) Any district magistrate or sub-divisional magistrate, or in a presidency-town, the commissioner of police may, if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1), exercise the power conferred by the said sub-section.

(iii) When an order is made under this section by a district magistrate, sub-divisional magistrate or commissioner of police, he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion having a bearing on the necessity for the order.'

Section 7 provides for the supply of the grounds of the order of detention to persons affected by the order and reads:-

'(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order, in a case where such order have been made by the Central Government to that Government, and in a case where it has been made by a State Government or an officer subordinate thereto to the State Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.'

In **State of Bombay v Atma Ram**¹²¹, the respondent was arrested on 21.4.1950, under the Preventive Detention Act, 1950, under an order made by the Commissioner of Police. Nine days later grounds for his detention were supplied to him. They were in the following terms:-

'That you are engaged or are likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay.'

In his petition for *habeas corpus* he contended that the ground was "delightfully vague and does not mention when, where or what kind of sabotage or how the applicant promoted it", that the ground gave no particulars and, therefore, was not a ground as required to be furnished under the Preventive Detention Act, 1950. He stated that the detaining authority acted *mala fide*, for a collateral purpose, outside the scope of the Act, and that therefore his detention in any event was illegal and *mala fide*. The Supreme Court agreed that a detenu should have sufficient information to enable him to make a representation and if it was not sufficient the order of detention was invalid.

Nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the court's inquiry and subject to the court's decision. The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i.e., materials on which the detention order was made. In

¹²¹ State of Bombay v Atma Ram AIR 1951 SC 157

our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make a representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is, whether it is sufficient to enable a detained person to make a representation at the earliest opportunity."

Three other judges gave judgments on this point to the same effect as the learned Chief Justice. A minority of two judges, however, disagreed. The learned Solicitor-General, however, urges us to follow the reasoning of Sastri J. who said in his dissenting judgment at pages 166-7:--

"When the power to issue a detention order has thus been made to depend upon the existence of a state of mind in the detaining authority, that is, its 'satisfaction', which is a purely subjective condition, so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention, it seems to me to be wholly inconsistent with that scheme to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation, for be it noted, the grounds to be communicated to the person detained are the 'grounds on which the order has been made'. Indeed the logical result of the argument advanced by the respondent's counsel would be to invalidate section 3 of the Act in so far as it purports to make the satisfaction of the government the sole condition of a lawful detention, for, if clause (5) of art. 22 were to be construed as impliedly authorising a judicial

review of the grounds of detention to see if they contain sufficient particulars for making a representation, then the subjective condition prescribed in section 3 would be inconsistent with that clause and therefore void."

4.3 PROVISIONS OF THE PREVENTIVE DETENTION'S STATUTE

The period of detention in the first instance shall not exceed three months. The order can also be made by the District Magistrate or a Commissioner of Police under their respective jurisdictions, but should report the fact to the State Government together with the grounds on which the order has been made. No such order shall remain in force for more than twelve days unless in the meantime, it has been approved by the State Government.

In **Ram Manohar v State of Bihar AIR 1966 SC 740¹²²**, the order of detention was also held to be bad because the expression used by the magistrate in stating one of the grounds for detention was not the expression used in rule 30(1)(b). The magistrate used the words "maintenance of law and order" whereas the rule uses the words "maintenance of public order". It was held by Sarkar J at page 746:-

"The satisfaction of the Government which justifies the order under the rule is a subjective satisfaction. A court cannot enquire whether grounds existed which would have created that satisfaction on which alone the order could have been made in the mind of a reasonable person. If that is so and that indeed is what the respondent State contends it seems to me that when an order is on the face of it not in terms of the rule, a court cannot equally enter into an investigation

¹²² Ram Manohar v State of Bihar AIR 1966 SC 740

whether the order of detention was in fact, that is to say, irrespective of what is stated in it, in terms of the rule"

An order of detention is mala fide if it is made for a 'collateral' or 'ulterior' purpose, i.e. a purpose other than what the Legislature had in view in passing the law of preventive detention. There is a mala fide exercise of the power if the grounds upon which the order is based are not proper or relevant grounds which would justify detention under the provisions of the law itself, or when it appears that the authority making the order did not apply his mind to it at all or made it for a purpose other than that mentioned in the detention order.¹²³

4.4 SUMMARY

The laws of preventive detention have come under wide criticism for their alleged misuse. The act's constitutional validity even during peacetime has been described by some sections as an anachronism.¹²⁴ However, it is acknowledged that India allow preventive detention with the enjoyment of constitutional validity. Furthermore, procedure rights of a detainee are recognized, in which substantive and procedural review are available in India.

The power of detention is entrusted to comparatively minor officials. Strict compliance with procedure is therefore necessary. Article 21 of the Indian Constitution provides that no person shall be deprived of his personal liberty except according to procedure established by law¹²⁵. Therefore, it is not subject to abuse of power, which is ought to be followed by other countries.

¹²³ Basu's Commentary on the Constitution of India, Volume 2, 5th Edition

¹²⁴ The article was part of a memorandum presented to the Prime Minister, the Home Minister and Ms. Sonia Gandhi when the author met them on August 6 as a member of a minority community delegation led by the Prince of Arcot Nawab Mohd Abdul Ali.

¹²⁵ Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

5.0 INTRODUCTION

It is pertinent to note that the relevant statutory provisions both in the UK and India have been so construed that it is possible to say that except on the ground of mala fide an order of detention which on the face of it appears authentic is difficult, if not, impossible to impugn. Let's make a comparison between the two countries and Malaysia.

5.1 COMPARISON BETWEEN MALAYSIA AND UK'S POSITION

The maximum period of detention provides by Malaysian ISA is 2 years as per Section 8 of the ISA, whereas the United Kingdom through Section 23 of TA provides for 28 days of detention only. The review of the particular detention in Malaysia is every three months, whereas review on a weekly basis has been adopted by the United Kingdom.

The extension of detention can be obtained by the Minister of Home Affairs in Malaysia under Section 8 as well, yet in the United Kingdom, Section 41 of TA insisted that the court has the final say, in which it is the duty of the court to determine whether or not to extend the period of a detention. In other word, the government has to show various reasons in order to obtain the extension applied for in court.

During the era of **Karam Singh**¹²⁶, it seems that the court has no power to look into the merits of the detention, but only on the procedural impropriety or technicalities. If compare to the United Kingdom's position, they urge the court to look into the merits of the

¹²⁶ Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

detention and judicial review is no doubt applicable herein. However, after **Darma Suria**¹²⁷, **Lee Kwan Woh**¹²⁸, and **Sivarasa Rasiah**¹²⁹, decision for **Karam Singh**¹³⁰ has been overruled and that subjective satisfaction of the authority which is not open to judicial review under Sections 8C and 8D is no longer usable. As such, the new development impose an objective test to the word 'if the Minister satisfied', in which the court has become the final arbiter upon the question of law.

Moreover, **Darma Suria**¹³¹, also overturned a believe that the best judge of what national security is, is the authority which has the charge of security, for instance the government and reasonable cause if something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless mala fide can be shown. Current development has given the court the final say upon which question of law is posted to, in which it is no longer in the hand of the Minister as before. This is quite similar with the United Kingdom's position where the court of law can question the sufficiency or relevance of these allegations of facts.

Nevertheless, the focus of the preventive detention in Malaysia did not specifically focus on a subject matter. It applies to whatever and whomsoever the Home Minister feels is a threat to national security by using Section 8 of the ISA to keep the detainee detained. As far as we can see from the current development, that who are against the government and criticise the government and/or defend the human rights also is being captured as detainees. Unlike the United Kingdom, where TA only focus on serious violence against a person, serious damage to property, endangers a person's life, other than that of the

¹²⁷ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

¹²⁸ *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301

¹²⁹ *Sivarasa Rasiah v Badan Peguam Negara and Anor* [2009] MLJU 01113

¹³⁰ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

¹³¹ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or the interfere with or seriously to disrupt an electronic system.

When the preventive detention's statutes had been made, the question is, are they ought to be reviewed? In Malaysia, the review of the ISA (if any) is vested in the hand of the Parliament. Whereas, under Section 36(1) of the TA, it is clearly stated that secretary or state must appoint a person to review the operation of the provisions of the TA itself. I'm of the view that it is a great idea which Malaysia should adopt from.

In terms of intensity of review, the reviewing court plays the inactive role of secondary reviewer, as Malaysia is still stuck at the stage of common law review, in which it is subject to the reasonableness. In comparing the standards of review, UK has a higher standards of review, which is at the closest and the most anxious scrutiny level as discussed in Para 3.4. In light of the situation where the detention is without trial, a higher standard of review should be adopted to prevent injustice.

5.2 COMPARISON BETWEEN MALAYSIA AND INDIA'S POSITION

The maximum period of detention provides by Malaysian ISA is 2 years compare to India which in the first instance shall not exceed 3 months, but it can be renewed from time to time. Yet, no such order shall remain in force for more than 12 days unless in the meantime, it has been approved by the State Government.

The position in Malaysia and India in regards to the principles governing the ISA is different. It would appear that the Indian courts insist on strict compliance with the law because of two reasons, as follows:-

- (i) The power of detention is in the hand of the Indian's civil servants, but in Malaysia, it is in the hand of the Yang Di-Pertuan Agong.
- (ii) Indian's ISA is holding a stronger principle of human rights in virtue of right to life and/or right to personal liberty, in which Malaysian's ISA did not confer upon those rights.

The older version of the Malaysian ISA has been discussed in **Karam Singh**¹³², in which the first reason reads:-

'...in India the power of detention, though given in the first instance to the Central and State Governments, was often exercisable, by civil servants who are not answerable politically to Parliament and whose action must therefore be closely scrutinised by the courts. However in Malaysia, the power of detention is given to the highest authority in the land, the Yang di-Pertuan Agong acting on Cabinet advice, and there has been no delegation to civil servants.'

It is significant that in **Liversidge v Sir John Anderson** [1942] AC 206¹³³ Viscount Maugham observed:-

"...it is to be noted that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of the government answerable to Parliament for a

¹³² Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

¹³³ Liversidge v Sir John Anderson [1942] AC 206

proper discharge of his duties. I do not think he is at all in the same position, as, for example, a police constable."

The second reason continued by **Karam Singh**¹³⁴, as such:-

'No person shall be deprived of his life or personal liberty except according to procedure established by law'

In India, procedure prescribed by Articles 22(5) and 22(6) must be complied with in order for the detention in accordance to the Preventive Detention Act valid and lawful, in which, it must not deprive of personal liberty which is not in accordance with the procedure established by law.¹³⁵ In contrast, Article 5(1) of our Constitution does not mention the word 'procedure'.

Both in India and Malaysia, the authority should inform the detainee of the grounds for his detention; and to be given an opportunity of making representations against the order of detention; but there are two things not available to a detainee in India, i.e. to be informed of the allegations of fact on which the order is based, Article 151(1)(a) and Section 11(2)(a)(ii) of the Act; and to be furnished in writing with a statement of such other particulars, if any, as he may, in the opinion of the Minister, reasonably require in order to make his representations against the order, Section 11(2)(b)(iii) of the Act.

The Indian courts have, however, held that the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed, if any of the grounds furnished to the detenu are found to be irrelevant when

¹³⁴ *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129

¹³⁵ *State of Bombay v Atma Ram* AIR 1951 SC 157

considering the application of Section 3(1)(a), or if some of the grounds supplied to him are so vague that they would virtually deprive him of the statutory right of making a representation.

Wherefore, it is crystal clear that Indian Prevention Act of 1960 prioritized their Constitution, so far as Articles 22(5) and 22(6) are concern, as the discrepancy between Malaysian's ISA would be on the part where it indirectly indicates the law of the ISA goes beyond the Federal Constitution, whereas it suppose to be the supreme law of the land. In this juncture, it is observed that all constitutions, be it neither Malaysia nor India, provides fundamental rights for human being, inclusive of detainees. It is prima facie observed that the law of India exercised and recognized human rights more than Malaysia does.

Whereas, aftermath of **Darma Suria**¹³⁶ to all the Preventive Detention's case, it seems that Malaysia has turn around and has some check and balance, in which the power of detention is in the hand of the Yang Di-Pertuan Agong, nevertheless it is subject to the reasonable satisfaction of the Honourable Court, which means that Judicial Review is applicable to cases in this regard, but any how limited to procedural review. Nevertheless, it is an improvement in the Malaysian Legal System especially towards the development of Administrative Law.

5.3 SUMMARY

Comparison between these 3 countries makes us realize that the law on preventive detention should always include Human Rights and Fundamental Rights of a detainee and continue to develop to provide a higher standard of review.

¹³⁶ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

6.0 SUMMARY

Today, politicians from across the board have called for the repeal of the ISA. In fact, there is now an initiative in Parliament to garner support from MP's from both sides to repeal the Act.

6.1 IMPORTANCE OF THE RESEARCH

How can we balance the need for ISA to protect the nation and on the other hand to ensure that the ISA are not abused by the executive to perpetuate its own agenda. With the expansion of administrative powers, the chances of misused of such powers increase tremendously. As such, it is vital to achieve a fine balance between prevention detention and human rights.

6.2 PROPOSAL

It is pertinent to note that ISA is indeed important to our nation for security sack. However, their Human Rights and Fundamental Rights are ought to be taken into account while reviewing the ISA. In light of this feature, it would be best to follow the Indian's position on preventive detention.

Hence, if detention without trial is accepted under Sections 8(1) and 73, then detainees should have the right to review their respective detention and that the ouster clause in Section 8B(1) should be removed. As such, the intensity of the review should be pitched at

the closest and the most anxious scrutiny level. In this regard, the higher standard of review in the UK should be followed.

Other than reviewing the statute to include rights of the detainees and a higher standard of review; it is pertinent to note that Malaysia still does not have a standard test. Karam Singh was the landmark case in holding that it should be a Subjective Test, but later on was overturned by *Darma Suria*¹³⁷ and became an Objective Test. It is proposed that the Objective Test be recognized as the only test from now on.

In regards to the appointment of the advisory board, it would be more independent if it is not the officers from the Attorney General Chambers being appointed as the Judicial Commission, but someone like the ex-judges, who have no worry about their promotion to a Judge.

In addition, Part XI of the Federal Constitution, namely Articles 149 and 151 should be reviewed as they conferred too much power on the executive which will abuse the purpose of the ISA, i.e. detaining for political purposes.

In short, ISA should be reviewed by looking at the development of other countries. In one hand, we need preventive detention law; however, in another hand, we must bear in mind that every detainee has rights which ought to be protected.

¹³⁷ *Darma Suria bin Risman Saleh v Menteri Dalam Negeri Malaysia and Others* 2009 MLJU 0835

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